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No. A-558

In the

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD PULLUM, APPELLANT

v.

CINCINNATI, INC., ETC., ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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February 18, 1986

THE QUESTIONS

1. Whether a statute of repose denies Fourteenth Amendment equal protection when it applies only to victims of 8 to 12 year old defective products, when it discriminates randomly among those victims, and when it bears no rational relationship to any legitimate state objective.

2. Whether the Florida Supreme Court has "eliminated the premise of Pullum's equal protection argument" - as claimed in the decision under review, *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 660 (Fla. 1985) (App., *infra*, 1a-6a).

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* The complete list of parties below includes Richard Pullum, Cincinnati, Inc., the Cincinnati Shaper Company, Sti-Gro Corp., f/k/a Harry P. Leu Machinery Corp., dissolved Florida corporation, Robert H. Stine, and Eugenie E. Stine and Robert E. Groth, as directors and/or trustees of Sti-Gro First Corp.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-6a) appears at 476 So.2d 657. The denial of rehearing is unreported (App., *infra*, 7a). The opinion of the District Court of Appeal, First District of Florida (App., *infra*, 8a-14a) appears at 458 So.2d 1136 and the decision of the Circuit Court of Duval County (App., *infra*, 15a-17a) is unreported.

JURISDICTION

Richard Pullum appeals the August 29, 1985, judgment of the Supreme Court of Florida, rehearing denied on November 4, 1985, which approved "the result only" of the district court of appeal's affirmance of a summary judgment on statute of repose grounds. Pullum filed the notice of appeal with the Florida Supreme Court on January 2, 1986 (App., *infra*, 18a). By order of January 24, 1986, Justice Powell extended the time for docketing this case until February 18, 1986.

This statement is presented to show that the Court has jurisdiction. A Fourteenth Amendment equal protection challenge has been rejected; and the question is substantial since the state supreme court purports to eliminate retroactively what it acknowledges is a valid federal equal protection argument. 28 U.S.C. § 1257(2).

The statute of repose had originally affected all victims of defective products more than 8 years old. However, in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874, (Fla. 1980) (App., *infra*, *32a-35a)*, the state supreme court had applied the rationale of *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979) (App., *infra*, 20a-31a), and expressly held that, as to all victims of defective products more than 12 years old, the statute violated the Florida Constitution's unique restriction guaranteeing access to

courts. There was no showing of the required "overpowering public necessity" to bar such rights of action before they ever existed. After *Battilla* the statute affected only victims of 8 to 12 year old defective products and could not accomplish the legislature's goal of preventing potential liability for defects in older products. Moreover, the statute discriminated irrationally among this small group of victims with some having one day, one week, one month, one year, two years, three years, three years 364 days, or anywhere in between, to file suit depending strictly upon how close the accident was to the twelfth anniversary of the first delivery.

In the decision under review, the supreme court announced it was "receding from *Battilla* and that it had thereby "eliminated the premise of Pullum's equal protection argument."

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, *Constitution of the United States:*

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The access to courts guarantee - Art. I, Sec. 21, *Fla. Const.* (1968):

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The statute of limitations - §95.11(3)(e), *Fla. Stat.* (1975):

> — Actions other than for recovery of real property shall be commenced as follows:
>
> (3) WITHIN FOUR YEARS. —
>
> (e) An action for injury to a person founded on the

design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including fixtures.

The statute of repose - §95.031(2), *Fla. Stat.* (1975) (quoted in its entirety in the decision under review, App., *infra*, 3a):

> Actions for product liability . . . under §95.11(3) must be begun within the period prescribed in this chapter [four years] . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

The statute of repose, as effectively "amended" by *Battilla's* 1980 enforcement of the Florida access to courts guarantee:

> Actions for products liability . . . under §95.11(3) must be begun within the period prescribed in this chapter [four years] . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered, except that anyone injured more than 12 years after the date of delivery of the completed product to its original purchaser shall have four years to bring an action.

("Amendment" indicated by underscoring.)

The statute of repose as effectively "amended" in 1985 by the Florida court's receding from Battilla in the decision under review:

> Actions for products liability . . . under §95.11(3) must be begun within the period prescribed in this chapter [four years] . . . but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

~~except that anyone injured more than 12 years after the date of delivery of the completed product to its original purchaser shall have four years to bring an action.~~

("Amendment" underscored and Deletion indicated by ~~strikeout~~)

STATEMENT OF THE CASE

Activated by an unguarded foot pedal, the ram of an unguarded press brake machine crushed Richard Pullum's hands. Alleging defective design, he filed suit when more than six months remained on the four-year tort statute of limitations. §95.11(3)(e), *Fla. Stat.* Nevertheless, on the day before trial, the court ruled the action barred by a different statute, the statute of repose, §95.031(2), *Fla. Stat.*, and granted summary judgment. Shortly before the scheduled trial, the manufacturer proved the press brake had been delivered 10½ years before the accident and more than 12 years before Pullum filed suit. Based on this revelation, the court barred the action.

In sum, Richard Pullum diligently filed suit less than four years after his injury, but has been denied a hearing on the merits because, unknown to him, the machine was delivered 10½ years before the accident and, unknown to him, the twelfth anniversary of the delivery passed when 2½ years remained on the four-year statute.

If the machine had been delivered 12 years and one day before his injury, Pullum would have had four full years to file suit.

How The Federal Equal Protection Argument Was Raised

Pullum has consistently sought federal equal protection from the effect of the "amended" statute of repose. The trial

court recited the challenge:

> Plaintiff asserts that the statute is unconstitutional because it denied Plaintiff equal protection of the laws under the Constitution of the United States and of the State of Florida.

(App., *infra,* 17a.) But, the court felt required by *Purk v. Federal Press Company,* 387 So.2d 354 (Fla. 1980), to reject the challenge (App., *infra,* 17a). The district court of appeal reiterated the issue:

> Pullum complains that he is denied equal protection because he had only one and a half years from his injury within which to file suit whereas a person injured by the same machine approximately two and one half years later (at least 12 years after delivery) would have, by virtue of the holding in *Overland,* four years within which to file.

Pullum v. Cincinnati, Incorporated, 458 So.2d 1136, 1138 (Fla. 1st DCA 1985) (App., *infra,* 12a). The district court had also noted

> . . . that those persons injured during the time frame of eight to twelve years after delivery date will be governed by a limitations period of something less than four years, such period depending upon the point, during that time frame, when the injury occurs (i.e., if the injury occurs nine years after delivery, the party would have three years to sue; if the date of injury was 10 years after delivery, suit would have to be brought within two years; etc.)

458 So.2d at 1138 (App., *infra,* 12a).

The district court affirmed; but, on rehearing, it expressed doubt about *Purk's* relevance by certifying the following "question of great public importance":

> Does Section 95.031(2), Florida Statutes, deny equal protection of the laws to person such as appellant who

are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

458 So.2d at 1140 (App., *infra,* 14a).

The district court's doubts about *Purk* were confirmed by the supreme court. (Undersigned counsel had obtained copies of the *Purk* briefs from the state archives and supplied them to the supreme court to show that Purk's unsuccessful equal protection argument had been entirely different from Pullum's challenge.) Thus, the supreme court approved the district court's "result only" (App., *infra,* 2a) and summarized the "amended" statute's denial of equal protection:

> Pullum asks this Court to quash the decision of the First District and to hold that section 95.031(2), as "amended" by this Court's decision in *Battilla v. Allis Chalmers Manufacturing Co.,* 392 So.2d 874 (Fla. 1980), violates his right to equal protection of the laws. In view of this decision, holding that where section 95.031(2) barred a right of action before it ever existed, it was unconstitutional as applied because it denied access to the courts, *Pullum argues that the statute now irrationally applies to a very limited class of persons, i.e., those persons injured during a time period of eight to twelve years after delivery of the completed product to its original purchaser. Those injured after twelve years have a full four years within which to bring their actions.*
>
> As originally enacted, Pullum maintains, this statute did not deny equal protection because the classifications created by the statute bore a rational relationship to a legitimate state objective. Its legislatively intended purpose was to prevent perpetual liability. It affected all victims of defective products delivered more than eight years before injury. He claims that this statute denied equal protection only after this Court's decision in

Battilla which *gave this statute a limited continuing application to only a small arbitrarily or accidentally chosen class of defective product victims and that it now no longer bears rational relationship to a legitimate state objective.*

Pullum v. Cincinnati, Inc., 476 So.2d 657, 659 (Fla. 1985) (App., *infra*, 3a-4a)(emphasis supplied) (footnote omitted).

Pullum relied on *Zobel v. Williams*, 457 U.S. 55, 65, 102 S.Ct. 2309, 2315, 72 L.Ed. 672, 681 (1982), which dealt with an analogous situation in which this Court had held unconstitutional an Alaska statute which irrationally discriminated between Alaskans based on whether they became residents before or after statehood.

To Eliminate The Federal Equal Protection Argument The Florida Supreme Court Abandoned An Established Florida Constitutional Principle And Overruled An Express Holding Of Unconstitutionality

The irrationality and purposelessness of discriminating only against victims of 8 to 12 year old defective products was all too apparent. The equal protection guaranteed by the Fourteenth Amendment was within Pullum's reach. But elimination replaced protection with this facile decree:

We have reconsidered our [1980] decision in *Battilla* wherein we expressly held:

> . . . We reverse on the authority of *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla. 1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution.

392 So.2d at 874. We recede from this decision and hold that section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida Constitution.

Pullum, 476 So.2d at 659 (App., *infra* 4a-5a).

The court offered no justification for making this radical change. Indeed, to their credit, counsel for appellees had accepted, as had counsel for Richard Pullum, that *Battilla* was and would remain the law. Neither party suggested that the court overturn this established protector of the access to courts guarantee; nor did the court suggest that the five years of *Battilla's* enforcement of the access to courts guarantee had detrimentally affected product manufacturers, the judicial system, or society in general. Moreover, the court disregarded the fact that the legislature had accepted *Battilla;* it had made no changes in the statute to cure the access to courts violation. And the court knew that the right of access to courts remained at the heart of the Declaration of Rights of the Florida Constitution and knew that to avoid violating the access to courts guarantee, a statute must meet an "overpowering public necessity for the abolishment of such right." *Overland,* 369 So.2d at 575 (App., *infra,* 23a). The court also knew that

> . . . in Florida . . . the unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this "statute of repose" may be valid under state or federal due process or equal protection clauses.

Id. Nevertheless, in its drive to transform the *Battilla* dissent into the new rule, the court discarded this unique restriction by dropping, apparently for this one statute, the overpowering public necessity requirement. Instead, it used only a rational basis test: "[t]he legislature . . . reasonably decided;" "I perceive a rational and legitimate basis . . . ." *Pullum,* 376 So.2d at 660 (App., *infra,* 5a). The court gave no explanation at all for its abandonment of the heightened standard of review.

The Florida Supreme Court's Assertion: "In Receding From Battilla, We Have Eliminated The Premise Of Pullum's Equal Protection Argument."

Having abandoned the long-established constitutional test for violation of the access to courts guarantee, the court then described the supposed impact of its law-changing adoption of the *Battilla* dissent. The Fourteenth Amendment's guarantee of equal protection became no more than an illusion in a game of "now you see it; now you don't" (at least in Florida courts) when the court said:

> The premise of Pullum's argument is that the "amendment" of this statute by *Battilla* has rendered it violative of his right to equal protection of the laws. He concedes that as enacted, this statute was capable of withstanding an equal protection challenge. Since we have receded from *Battilla,* it logically follows that section 95.031(2) does not deny equal protection. This is so because the classification originally established by the statute bears a rational relationship to a proper state objective. *In receding from Battilla, we have eliminated the premise of Pullum's equal protection argument.*

376 So.2d at 660 (App., *infra,* 6a) (emphasis supplied).

The Logical Question: Did The Receding From Battilla Eliminate The Premise Of Pullum's Federal Equal Protection Argument? The Answer: It Did Not.

We come to correct the court's error, not to criticize the court unduly. Indeed, history reflects that the 1985 author of *Pullum,* a 1980 dissenter in *Battilla,* had just announced his resignation. Pressured by his impending departure, the court issued a phenomenal 64 opinions in two days, August 29 and 30, 1985. 10 Florida Law Weekly 422-492, 495-504. This push to clear the cases in which the resigning justice was

participating may explain how the court, speaking through him, mistakenly said it had, after the fact, "eliminated" a federal equal protection challenge.

In 1980 the *Battilla* court declared that insofar as the statute absolutely barred rights of action, it violated the access to courts guarantee. The court thereby invalidated that aspect of the statute from the time of its 1975 effective date (not merely from the time of *Battilla*) and rendered it as inoperative as if it had never been enacted. *Ex parte Messer,* 87 Fla. 92, 99 So. 330 (1924), *State ex rel Nuveen v. Greer,* 88 Fla. 249, 102 So. 739 (1924). *Pullum* resuscitated it in 1985. Richard Pullum was injured in 1977.

The Florida court has, therefore, misapprehended the effect of its "deunconstitutionalization" of the statute's absolute bar. There is no impact on Pullum's federal equal protection challenge. It remains unanswered.

Reason One. Those in the class that benefitted from *Battilla* (all those injured by older defective products during the decade since enactment) have all had "four full years within which to bring their actions," as the *Pullum* opinion acknowledges. 476 So.2d at 659 (App., *infra,* 4a.) The court's "receding from *Battilla*" could have absolutely no effect on those injured between 1975 and 1985 by older defective products whose cases had already been resolved. Those plaintiffs were not affected in any way by the absolute bar of the statute of repose (because during that time it was unconstitutional; it was a nullity). Thus, the fact remains that Pullum, injured in 1977 by a defective product between 8 and 12 years old, has been deprived of equal protection when compared with those victims whose cases have been resolved and who were injured by defective products less than 8 or more than 12 years old during the decade 1975 to 1985. The receding from *Battilla* did not rectify this unconstitutional discrimination.

Reason Two. Unless the "deunconstitutionalization" of

the statute is retroactive, those victims who were hurt by older defective products during the decade of the statute's unconstitutionality whose cases have not been resolved yet (i.e., cases in the pipeline when *Pullum* was decided) are protected from the statute while Richard Pullum is barred by it. Perplexingly, it appears that the supreme court had not even identified this retroactivity question when the *Pullum* opinion was written. However, the district court of appeal, which had earlier certified Pullum's equal protection challenge to the court, soon faced the issue: Does *Pullum* apply retroactively to destroy the vested *Battilla*-born right of action of a person hurt by a defective product delivered more than 12 years before the accident? Since *Pullum* was silent on this point (the supreme court had not explained how its decision purportedly eliminated Pullum's equal protection challenge), the district court, in *Cassidy v. The Firestone Tire and Rubber Company,* Case No. BK-198 (App., *infra,* 36a.), certified

> . . . the following question as one requiring immediate resolution by the Supreme Court because it is of great public importance and will have a great effect on the proper administration of justice throughout the state:
>
> Whether The Rule Announced in *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) Is Applicable To Cases Filed Prior To Publication Of That Opinion.

The supreme court, now without the resigned author of *Pullum,* declined to answer the question. *Cassidy v. The Firestone Tire and Rubber Company,* Case No. 68,160 (App., *infra,* 37a). It elected to stand mute on whether its "receding from *Battilla*" is intended to be retroactive, or whether it is a prospective overruling of which Richard Pullum is the chance victim. (The uncertainty bred by the district court's unsuccessful attempt to get an answer from the Florida

Supreme Court on the retroactivity question resulted in Pullum's applying for, and receiving from Justice Powell, a short extension of time for the docketing of this appeal.)

Although the Florida Supreme Court has chosen to await the guidance of the lower Florida courts as to whether its own *Pullum* decision will be permitted to apply retroactively to destroy the vested rights of action of victims of older defective products, Richard Pullum has no such luxury because the court purports to have somehow eliminated the premise of his equal protection argument.

There are substantial reasons to expect that the lower Florida courts will hold that the "deunconstitutionalization" of the long unconstitutional statute will not be given retroactive effect. In *Davis v. Artley Const. Co.*, 18 So.2d 255, 259 (Fla. 1944), the Florida Supreme Court decided that to retroactively deprive a litigant of the benefit of a prior decision on which the litigant's rights depend is to unconstitutionally deprive him of his right of access to the courts. Moreover, in addition to protecting litigants from the unforeseeable impact of changed rulings, the Florida court has *previously* explained that "due process considerations . . . prohibit retroactive abolition of vested rights." *Rupp v. Bryant*, 402 So.2d 658, 666 (Fla. 1982).

Federal due process considerations also make it appear the ultimate result will be non-retroactivity. In *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), this Court held that a recent law-changing decision could not be applied retroactively to time-bar an action. The Court noted that it had overturned a long line of Fifth Circuit rulings. And, apropos to the position of those who have received the benefit of *Battilla's* enforcement of the access to courts guarantee and whose cases have not yet been resolved (i.e., those in the pipeline), the Court declared:

> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing

year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was.

92 S.Ct. at 356. Recognizing the practical implications of a retroactive application of its decision, the Court said (with particular relevance to the causes of action which have accrued under *Battilla,* but which would be absolutely barred if *Pullum* is applied retroactively):

> [R]etroactive application of the Louisiana statute of limitations to his case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable.

Id. Given that those *Battilla*-born causes of action would be absolutely barred if the *Pullum* ruling were retroactive, the Florida plaintiffs would be worse off than Huson, as to whom the Court said:

> It would also produce the most "substantial inequitable results" . . . to hold that the respondent "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him. [W]e invoked the doctrine of nonretroactive application to protect property interests of "cities, bondholders, and others connected with municipal utilities;" and . . . we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly, the respondent's potential redress for his allegedly serious injury — an injury that may significantly undercut his future earning power — is entitled to similar protection

Id. (emphasis supplied). The Court concluded its analysis by

saying, *"[N]onretroactive application here simply preserves his right to a day in court." Id.* (citations and footnote omitted).

The Result: The Federal Equal Protection Challenge Remains - Unresolved.

A decade of rights of action for victims of older defective products have been unaffected by the 12-year bar, i.e., *those* plaintiffs (unlike Richard Pullum and those in *his* circumstances) have had and are entitled to "four full years within which to bring their actions." Therefore, it is a matter of plain fact that the Florida court has not "eliminated the premise of Pullum's equal protection argument" under the United States Constitution, notwithstanding its "receding from *Battilla.*" Merely saying so does not make it so. The Florida court cannot constitutionally retroactively deprive Richard Pullum of his right to present and have decided his claim of denial of equal protection under the Constitution of the United States.

THE QUESTIONS ARE SUBSTANTIAL

This case merits plenary review, if not summary reversal. It is not every day, indeed our research discloses no other day, when a state supreme court, by changing the law after the fact, attempts to eliminate an obviously valid federal equal protection challenge. Although Richard Pullum's case concerns irrational discriminatory application of a statute of repose, the next case may involve racial, religious, sexual, age or handicap discrimination, or it may be a tax law or criminal law case. Will people who have suffered denial of equal protection in those circumstances be deprived of a remedy because a state court changes the rules for the future but ignores the damage done during the period of irrational discrimination? Equal justice under the law is the mandate of the Fourteenth Amendment. It is not to be taken lightly by state courts.

In 1980 the Florida Supreme Court clipped the tail of the statute of repose but did not invalidate it completely. This necessarily created an equal protection problem. The statute immediately became incapable of accomplishing its only purpose, the prevention of potential perpetual products liability. Thus frustrated, the statute had only a limited continuing application - the cutting short of the limitations period for victims of 8 to 12 year-old defective products. Why discriminate against the victims of pre-teen defective products? There was no reason. Pullum's counsel saw this and made the equal protection challenge.

This Court's decision in *Zobel, supra,* is on point. If the Florida court had simply held that the "amended" statute did not deny Pullum equal protection, summary reversal would plainly be in order. However, without questioning its accuracy, the court detailed the analysis by which Pullum proved the irrational inequality of the "amended" statute. And prior precedent gave Pullum every reason to expect the statute to be invalidated entirely. In the same year as *Battilla,* the court had held that, when a statute could not be interpreted to avoid a due process violation without violating the access to courts guarantee, the court had no choice but to void the statute entirely because "we are left, then, with a statute which is intractably, and incurably, defective." *Aldana v. Holub,* 381 So.2d 231, 238 (Fla. 1980).

Nevertheless, the court abandoned this approach. Although *Battilla* had long before declared the constitutional law and had been fully accepted by the Bench and Bar, and although nothing foreshadowed the overruling, the court announced it would recede from *Battilla.* In this law-changing decision the court recited no change in circumstances, no change in the constitution and no change in the statute itself.

We understand what happened below. A new majority had emerged on the Florida court. This majority liked the social policy expressed by the statute of repose, but the make-up of the court was about to change again. And Richard Pullum's

plight presented perhaps the last opportunity for the court to resurrect the statute.

Pullum does not quarrel in this Court with that court's right to reverse itself and change the rule for the future. Pullum's argument is more fundamental.

The pledge of "EQUAL JUSTICE UNDER LAW" which graces the frontispiece of this Court's building is no mere pebble on a state court's path to social engineering. Yet in its march to revive the statute of repose, instead of allowing the legislature to deal with the problem, the Florida court stepped on Richard Pullum's right to equal justice under the law.

Does the court's end justify its means? This is a substantial federal question. Indeed, because this is an appeal, and not a petition for certiorari, a dismissal for lack of a substantial federal question would constitute an affirmance with implications of momentous proportions - it would give state courts the green light to circumvent the Fourteenth Amendment.

Summary reversal may be in order. If not, full briefing and oral argument are needed. In *Huson* this Court rejected "the fiction that the law now announced [in an overruling decision] has always been the law." 92 S.Ct. at 356. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, 454, n.8, 74 L. Ed. 1107 (1930), this Court said

> State courts, like this Court, may *ordinarily* overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.

And in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 148, 77 L.Ed 360 (1932), the court observed that state courts "may *often*" overrule retroactively without violating the Fourteenth Amendment.

We respectfully submit that, when a state court purports to eliminate retroactively a valid equal protection challenge by

overruling a prior express holding of unconstitutionality, it has gone beyond the *ordinary*, beyond what state courts may *often* do, and has run afoul of the Fourteenth Amendment.

CONCLUSION

The appeal involves a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Plenary review, or summary reversal, should be granted.

Respectfully submitted,

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February 18, 1986 ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 18th day of February, 1986 to Michael J. Arington, Esquire, 1001 Blackstone Building, Jacksonville, Florida 32202, Attorney for Appellees; and pursuant to Rule 28.4(c), by United States Mail to The Honorable Jim Smith, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32301, inasmuch as 28 U.S.C. §2403(b) may be applicable since there is drawn in question the constitutionality of a state statute, which had long been held unconstitutional by the Florida Supreme Court, but which has been recently been revived by the decision under review.

Attorney

APPENDIX

No. A-558

In the

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OCTOBER TERM, 1985

RICHARD PULLUM, APPELLANT

v.

CINCINNATI, INC., ETC., ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX TO JURISDICTIONAL STATEMENT

Wayne Hogan
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804 Blackstone Building
Jacksonville, Florida 32202
904/632-2424
Attorney for Appellant

Richard PULLUM, Petitioner

CINCINNATI, INC. the Cincinnati Shaper Company, Sti-Gro Corp., f/k/a Harry P. Leu Machinery Corp. dissolved Florida corporation, Robert H. Stine, Eugenie E. Stine and Robert E. Groth, as directors and/or trustees of Sti-Gro First Corp., Respondents.

No. 66198

Supreme Court of Florida

Aug. 29, 1985.

Rehearing Denied Nov. 4, 1985.

The District Court of Appeal, 458 So.2d 1136, certified as being of great public importance, question whether products liability statute of repose denied equal protection to plaintiff who filed suit against manufacturer more than 12 years from date of delivery of product to original purchaser. The Supreme Court, Alderman, J., held that statute, which provides, inter alia, that an action for products liability must be begun within 12 years after date of delivery of completed product to its original purchaser does not deny equal protection under the state Constitution.

Decision approved.

Adkins and Overton, JJ., dissented.

Constitutional Law ⇐ 249(3)
Limitation of Actions ⇐ 4(2)

Statute of repose, West's F.S.A. § 95.-031(2), provising inter alia, that actions for products liability must be begun within 12 years after date of delivery of completed product to its original purchaser does not deny equal protection

guaranteed by West's F.S.A. Const. Art. 1, § 21; receding from *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874.

Wayne Hogan of Brown, Terrell, Hogan & Ellis, Jacksonville, for petitioner.

Michael J. Arington of Ellis E. Neder, Jr., P.A., Jacksonville for respondents.

Cathy Jackson Burris, Ft. Lauderdale for Academy of Florida Trial Lawyers, amicus curiae.

ALDERMAN, Justice.

We review the decision of the District Court of Appeal, First District, in *Pullum v. Cincinnati,* 458 So.2d 1136 (Fla.1984) wherein the district court certified the following question as being of great public importance:

> Does section 95.031(2), Florida Statutes deny equal protection of the laws to persons such as appellant [petitioner] who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

Id. at 1140. The First District, on the authority of several decisions of our Court, answered this question in the negative and affirmed the summary judgment against Pullum. We approve the result only of this decision.

Richard Pullum was injured in April 1977 while operating a Cincinnati press brake machine which had been delivered to the original purchaser in November 1966. He filed suit against the manufacturer in November 1980, more than twelve years from this delivery date but within the applicable four-year statute of limitations. The trial court granted summary judgment against Pullum on the basis that his action was barred by section 95.031(2), Florida Statutes (1979). This statute of repose provides:

(2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

The district court affirmed. Relying on *Purk v. Federal Press Co.*, 387 So.2d 354 (Fla.1980), it held that the reduction by this statute of repose of the time within which he was required to file suit after his accident from four years to one and one-half years did not deny him equal protection of the laws. It explained that the fact that Mrs. Purk's injury occurred prior to the enactment of section 95.031 and was covered by a one-year savings clause, while Pullum's injury occurred after the effective date of the act, did not furnish Pullum with any equal protection argument materially different from that of Mrs. Purk's. Pullum conceded that application of section 95.031(2) did not deny him his right to access to the courts guaranteed by article I, section 21 of the Florida Constitution.

Pullum asks this court to quash the decision of the First District and to hold that section 95.031(2), as "amended" by this Court's decision in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla.1980), violates his right to equal protection of the laws. In view of this decision, holding that where section 95.031(2) barred a right of action before it ever existed, it was unconstitutional as applied because it denied access to the courts, Pullum argues that the statute now irrationally applies to a very limited class of persons, *i.e.*, those persons injured during a time period of

eight to twelve years after delivery of the completed product to its original purchaser. Those injured after twelve years have a full four years within which to bring their actions.

As originally enacted, Pullum maintains, this statute did not deny equal protection because the classifications created by the statute bore a rational relationship to a legitimate state objective. Its legislatively intended purpose was to prevent perpetual liability. It affected all victims of defective products delivered more than eight years before injury. He claims that this statute denied equal protection only after this Court's decision in *Battilla* which gave this statute a limited continuing application to only a small arbitrarily or accidentally chosen class of defective victims and that it now no longer bears rational relationship to a legitimate state objective.*

Pullum further urges that this Court find that this case involves an entirely different equal protection challenge than was made in *Purk*. Mrs. Purk's argument, he states, was strictly directed to the legislature's choice of twelve years as an ultimate cutoff point to prevent perpetual liability.

We have reconsidered our decision in *Battilla* wherein we expressly held:

> The circuit court held that this product liability action was barred by the statute of limitations, section 95.031,

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* Pullum also refers to *Diamond v. E.R. Squibb and Sons, Inc.*, 397 So.2d 671 (Fla.1981), as being in accord with *Battilla*. In *Diamond*, we held that the operation of section 95.031(2) operated to bar a cause of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But *Diamond* presents an entirely different factual context than existed in either *Battilla* or the present case where the product first inflicted injury many years after its sale. In *Diamond* the defective product, a drug known as diethystilbestrol produced by Squibb was ingested during plaintiff mother's pregnancy shortly after purchase of the drug between 1955 - 1956. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiff's claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond*. Were it applicable, there certainly would have been a denial of access to the courts.

Florida Statutes (1975). We reverse on the authority of *Overland Construction Co. v. Sirmons,* 369 So.2d 572 (Fla.1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution. *See also Purk v. Federal Press Co.,* 387 So.2d (Fla.1980); *Bauld v. J.A. Jones Construction Co.,* 357 So.2d 401 (Fla. 1978).

392 So.2d at 874. We recede from this decision and hold that section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida Constitution. The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product. Justice McDonald, in maintaining the constitutional validity of section 95.031(2) in his dissenting opinion in *Battilla,* correctly reasoned as follows:

> Until the decision of *Matthews v. Lawnlite Co.,* 88 So.2d 299 (Fla.1956), Florida recognized the early common law rule which inhibited recovery where there was no privity of contract. Since then the law of products liability has evolved to the point that we now recognize liability of a manufacturer which sells a product in a defective condition unreasonably dangerous to the user or consumer.
>
> This developing liability of a manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold a manufacturer should be subject to liability for an injury whenever caused by that product. It could also be argued that such liability would place an onerous burden on industry and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufacturer products.
>
> . . . I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the

relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than most manufactured products there is a distinction in the categories of liability exposure between those sought to be limited by section 95.11(3)(c), struck down in *Overland*, and those listed in section 95.031(2).

The premise of Pullum's argument is that the "amendment" of this statute by *Battilla* has rendered it violative of his right to equal protection of the laws. He concedes that as enacted, this statute was capable of withstanding an equal protection challenge. Since we have receded from *Battilla*, it logically follows that section 95.031(2) does not deny equal protection. This is so because the classification originally established by the statute bears a rational relationship to a proper state objective. In receding from *Battilla*, we have eliminated the premise of Pullum's equal protection argument.

Accordingly we hold that the granting of summary judgment by the trial court was proper, and we approve the result of the district court's decision which affirms the summary judgment.

It is so ordered.

Supreme Court of Florida

MONDAY, NOVEMBER 4, 1985

RICHARD PULLUM,

Petitioner,

v.

CINCINNATI, INC., et al.,

Respondents.

CASE NO. 66,198

District Court of Appeal,
1st District - No. AU-62

Upon consideration of the Motion for Rehearing filed by attorney for petitioner and the Motion for Rehearing and Clarification filed by attorneys for Amicus Curiae, Academy of Florida Trial Lawyers, and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied.

BOYD, C.J., McDONALD, EHRLICH and SHAW, JJ., concur

OVERTON, J., I find nothing new in the petition for rehearing; consequently, I am bound to deny rehearing even though I disagree with the majority opinion and would allow a claim to be brought within the four-year statute of limitations period if the cause of action accrued within the twelve-year period of the statute of repose.

ADKINS, J., dissents

Richard PULLUM, Appellant,

v.

CINCINNATI, INCORPORATED, the Cincinnati Shaper Company, Sti-Gro First Corp., formerly known as Harry P. Leu Machinery Corporation, a dissolved Florida corporation, Robert H. Stine, Eugenie E. Stine and Robert E. Groth, as directors and/or trustees of Sti-Gro First Corp., Appellees.

No. AU-62.

District Court of Appeal of Florida,
First District.

Sept. 26, 1984.

Rehearing Denied Nov. 16, 1984.

Worker injured while operating press brake machine filed suit against manufacturer and others on basis of negligence, implied warranty, and strict liability. The Circuit Court, Duval County, John M. McNatt, J., entered summary judgment against worker on basis that claim was barred by statute of repose, and worker appealed. The District Court of Appeal, Nimmons, J., held that: (1) application of statute of repose to worker reducing time within which he was required to file suit after accident from four years to a little over one and one-half years did not amount to proscribed limitation of access to courts under State Constitution, and (2) fact that operation of statute of repose reduced otherwise available four-year limitation period to period of a little more than one and one-half years in which to file suit, whereas those persons injured by products delivered 12 years or more before injury would continue, by application of holding in

Florida Supreme Court case finding that barring of cause of action under similar statute of repose before cause of action accrued was repugnant to constitutional guarantee of right access to courts, to have four years within which to file suit, was not a denial of equal protection.

Affirmed.

1. Constitutional Law ⇐ 328
Limitation of Actions ⇐ 4(2)

Application of statute of repose to worker who, after being injured while operating press brake machine, filed suit against manufacturer of machine and others on basis of negligance, implied warranty and strict liability within four-year limitations period for such action, but more than 12 years after a delivery of press brake to original purchaser, did not amount to proscribed limitation of access to courts under State Constitution, even though application of statute of repose reduced period within which worker was required to file suit after accident from four years to a little over one and one-half years. West's F.S.A. Const. Art 1, § 21; West's F.S.A. §§ 95.031(2), 95.11(3)(e).

2. Constitutional Law ⇐ 249(3)
Limitation of Actions ⇐ 4(2)

Fact that operation of statute of repose reduced otherwise available four-year limitation period for worker injured by equipment installed within 12 years of injury to period of a little more than one and one-half years in which to file suit against manufacturer, whereas those persons injured by products delivered 12 years or more before injury would continue, by application of holding in Florida Supreme Court case finding that barring of cause of action under statute of repose before cause of action accrued is repugnant to constitutional guarantee of right of access to courts, to have four years within which to file suit, was not a denial of equal

protection. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 21; West's F.S.A. § 95.031(2).

Wayne Hogan of Brown, Terrell & Hogan, Jacksonville, for appellant.

Ellis E. Neder, Jr., Jacksonville, for appellees.

NIMMONS, Judge.

Richard Pullum, plaintiff below, appeals a summary judgment entered against him on the basis that his claim was barred by Section 95.031(2), Florida Statutes,[1] a statute of repose. We affirm.

On April 29, 1977, Pullum, while operating a Cincinnati pressbrake machine, was injured by the machine. On November 26, 1980, Pullum filed suit against the manufacturer and others on the basis of negligence, implied warranty and strict liability. Although the suit was filed within the four-year limitations period provided for in Section 95.11(3)(e), Florida Statutes, it was not filed within twelve years from the November 11, 1966, delivery of the subject pressbrake to the original purchaser as required by the statute of repose. Therefore, the trial court entered summary judgment against Pullum.

[1] Application of the statute of repose to Pullum reduced the time within which he was required to file suit after his accident from four years to a little over one and one-half years. This does not amount to a proscribed limitation of

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[1]Section 95.031(2) provides: (2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period described in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), *but in any event within 12 years after the date of delivery of the completed product to its original purchaser* or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered. (e.s.)

access to courts under Article I, Section 21, of the Florida Constitution. See *Cates v. Graham,* 451 So.2d 475 (Fla.1984); *Purk v. Federal Press Company,* 387 So.2d 354 (Fla.1980); *Bauld v. J.A. Jones Construction Company,* 357 So.2d 401 (Fla.1978). Pullum concedes that point but urges that the application of the subject statute denies equal protection of the law. He points out that if the accident had occurred twelve years or more after delivery of the machine, the statute of repose would not have barred his action, and he would have had, pursuant to Section 95.11(3), four years from the accident date within which to file his suit. This is so because of the Supreme Court's holding in *Overland Construction Company, Inc. v. Sirmons,* 369 So.2d 572 (Fla.1979), in which the court held that the barring of a cause of action under a similar statute of repose[2] before the cause of action accrued is repugnant to the Article I, Section 21, guarantee of the right of access to courts.[3] The results of the interplay among the regular four-year limitations statute, the twelve-year statute of repose and the holding in *Overland* are: (1) that a person who sustains an injury at any time within eight years from the product's initial delivery date will have four years from the date of injury within which to file suit; (2) that a person injured twelve years or more after the delivery date will also have four years from the date of injury to sue because *Overland* would preclude the operation of the twelve-year statute; provided, however, that such person might not have as many as four years to bring the action

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[2] Although the statute of repose involved in *Overland,* Section 95.11(3)(c), deals with liability for improvements to real property, the *Overland* holding applies equally to product liability statutes of repose such as Section 95.031(2). See *Battilla v. Allis Chalmers Manufacturing Company,* 392 So.2d 874 (Fla.1981); *cf. Purk v. Federal Press Company, supra.*

[3] In *Overland, supra,* the Court distinguished *Bauld, supra,* pointing out that, in *Bauld:* (1) the injury occurred prior to the enactment of the applicable statute of repose; (2) two and one-half years of the four year limitations period had elapsed when the statute was enacted: and (3) a savings clause extended the deadline an additional year for filing suit on existing causes of action which otherwise would have been terminated by the new twelve-year limitation.

where his injury occurred prior to January 1, 1975, the effective date of Chapter 74-382, Laws of Florida (the law creating Section 95.031), and where he would be required to file suit by January 1, 1976, by virtue of the one-year savings clause provided for by Chapter 74-382, section 36; and (3) that those persons injured during the time frame of eight to twelve years after delivery date will be governed by a limitations period of something less than four years, such period depending upon the point, during that time frame, when the injury occurs (i.e., if the injury occurs nine years after delivery, the party would have three years to sue; if the date of injury was 10 years after delivery, suit would have to be brought within two years; etc.). Pullum complains that he is denied equal protection because he had only one and a half years from his injury within which to file suit whereas a person injured by the same machine approximately two and one-half years later (at least 12 years after delivery) would have, by virtue of the holding in *Overland,* four years within which to file.

The Supreme Court of Florida has consistently sustained such statutes of repose against constitutional attack where application of the statute leaves the plaintiff with sufficient time to institute suit after injury or discovery of the cause of action. See *Cates v. Graham, supra; Purk v. Federal Press Co., supra; Bauld v. J. A. Jones Construction Company, supra; Universal Engineering Corp. v. Perez,* 451 So.2d 463 (Fla.1982); *compare Overland Construction Company, Inc. v. Sirmons, supra; Diamond v. Squibb and Sons,* 397 So.2d 671 (Fla.1981); and *Baitilla v. Allis Chalmers Manufacturing Company, supra.* Admittedly, most of these authorities have dealt with attacks under the Article I, Section 21, "access to courts" provision.[4] However, in *Purk,* the plaintiff also

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[4]For example, the Court stated in *Overland, supra:* "[T]he unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this 'statute of repose' may be valid under state or federal due process or equal protection clauses."

contended that the statute denied her equal protection of the laws, which contention was rejected by the Supreme Court. Mrs. Purk was injured on April 24, 1973, by a punch press machine which had originally been delivered on June 2, 1961. The applicable limitation statute would have given her four years from the injury date within which to file suit. However, the statute of repose, enacted effective January 1, 1975, barred actions for injuries occurring twelve years or more after the delivery date. But the statute's savings clause afforded one year to all existing causes of action (i.e., until January 1, 1976) within which to file suit. Mrs. Purk's four-year period for filing suit was therefore reduced to approximately two years and eight months (the period of time between the April 24, 1973, date of accident and the savings clause date, January 1, 1976). In contrast, a person injured by the same machine almost one year and four months earlier than the date of Mrs. Purk's injury would have had four years within which to file suit. Moreover, and perhaps more significantly, the Supreme Court in *Purk* recognized that the statute of repose with which it was dealing was subject to its decision a year earlier in *Overland, supra,* which materially affected the application of the statute by, as we have noted, holding that persons injured after the running of the twelve-year statute of repose would have four full years from the date of injury within which to file suit. The *Purk* court, nevertheless, held that the statute did not deny equal protection of the laws.

[2] The fact that Mrs. Purk's injury occurred prior to the enactment of Section 95.031 and thus was covered by the one-year savings clause of Chapter 74-382, Section 36,[5] whereas Pullum's injury occurred after the effective date of the act, does not furnish Pullum with any equal protection argument materially different from that of Mrs. Purk. The statute of repose operated on both to reduce their otherwise

[5] This savings clause was codified as Section 95.022, Florida Statutes (1975).

available four-year limitation periods to lesser periods whereas those persons injured by products delivered twelve years or more before the injury continue to have four years within which to file suit. The Supreme Court having denied in *Purk* the equal protection attack on the subject statute, we likewise reject such attack in the instant case.

Essentially, persons such as Mr. Pullum who claim to have been caught in the legislatively imposed statute of repose time squeeze are left only with a denial of access to the courts argument where the injury occurs too close in time to the end of the twelve-year period. As previously noted, this argument is unavailing to Pullum inasmuch as one and one-half years still remained after the accident before the twelve-year period expired. In *Cates v. Graham, supra,* which involved application of another statute of repose dealing with medical malpractice,[6] the Supreme Court held that a five-to-six-month time squeeze imposed by the statute upon the plaintiff did not constitute an unconstitutional denial of access to the courts. See also *Cobb v. Maldonaldo,* 451 So.2d 482 (Fla. 4th DCA 1984) (on motion for rehearing).

The summary judgment is Affirmed.

MILLS and SMITH, JJ., concur.

On Motion for Rehearing

PER CURIAM.

Although we deny the appellant's motion for rehearing, we certify the following, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v), as a question of great public importance:

> Does Section 95.031(2), Florida Statutes, deny equal protection of the laws to persons such as appellant who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

MILLS, SMITH and NIMMONS, JJ., concur.

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[6] Section 95.11(4)(b), Florida Statutes.

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 80-14330-CA

DIVISION: O

RICHARD A. PULLUM,

Plaintiff,

vs.

CINCINNATI, INCORPORATED,

et al

Defendants.

SUMMARY FINAL JUDGMENT

This cause came on for further hearing and Defendant moved (ore tenus) for the entry of Summary Judgment on the ground that the action was barred by that Statute of Limitations, Chapter 95.031(2), Florida Statutes.

The Court having ruled that the action is barred by the Statute of Limitations, and Plaintiff having waived the requirements of twenty days notice (Rule 1.510, Rules of Civil Procedure) and there being no genuine issue as to material fact with regard to the Statute of Limitations, it is

ORDERED AND ADJUDGED:

1. The Motion is granted.

2. Plaintiff shall take nothing by this action, and Defendants shall go hence without day and recover from Plaintiff their costs to be taxed on Motion and Notice.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 29th day of June, 1983.

s/John M.McNatt

CIRCUIT JUDGE

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 80-14330-CA

DIVISION: O

RICHARD A. PULLUM,

Plaintiff,

vs.

CINCINNATI, INCORPORATED, et al

Defendants.

ORDER RE: STATUTE OF LIMITATIONS

At their special request the parties have been heard upon the question of whether this action is barred by the statute of limitations, namely Chapter 95.031(2), Florida Statutes.

The parties stipulated before the Court.

(a) The machine, a Press Brake, was delivered to the original purchasers on November 11, 1966.

(b) The Plaintiff was injured while operating the machine on April 29, 1977.

(c) This action was filed November 25, 1980.

The cited statute requires that such an action be filed "within 12 years after the date of delivery," whereas this action was filed fourteen years and fourteen days after the date of delivery; and three years, six months and twelve days after the injury.

The Plaintiff had one year six months and twelve days to file his action before the statute ran, but did not do so.

Plaintiff asserts that the statute is unconstitutional because it denies Plaintiff equal protection of the laws under the Constitution of the United States and of the State of Florida. However, the Supreme Court of Florida has held the statute to be Constitutional. *Purk v. Federal Press Company* (Fla) 387 So(2d) 354.

This action falls squarely within the *Purk* decision, and the Court is compelled to rule that the action is barred by said statute of limitations.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 27th day of June, 1983.

s/John M. McNatt

CIRCUIT JUDGE

IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. 66,198

RICHARD PULLUM, Appellant

vs.

CINCINNATI, INC., THE CINCINNATI SHAPER COMPANY, STI-GRO CORP., f/k/a Harry P. Leu Machinery Corp. dissolved Florida corporation, ROBERT E. STINE, EUGENIE E. STINE and ROBERT E. GROTH, as directors and/or trustees of Sti-Gro First Corp., Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard Pullum, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida entered in this action on November 4, 1985, by denial of rehearing. The judgment approved "the result only," but not the rationale, of the district court of appeal's decision affirming the summary judgment entered by the trial court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 30th day of December, 1985 to Ellis E. Neder, Jr., Esquire, 1001 Blackstone Building,

Jacksonville, Florida 32202, Attorney for Appellees, Cathy J. Burris, Esquire, P.O. Box 030067, Ft. Lauderdale, Florida 33303 and W. C. Gentry, Esquire, 101 East Adams Street, Jacksonville, Florida, Attorneys for Amicus Curiae, Academy Florida Trial Lawyers.

BROWN, TERRELL, HOGAN & ELLIS, P.A.

s/Wayne Hogan

WAYNE HOGAN
804 Blackstone Building
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904/632-2424
Attorneys for Appellant

OVERLAND CONSTRUCTION COMPANY, INC., Petitioner,

v.

Jerry L. SIRMONS, et ux., et al., Respondents (Two cases).

Nos. 52799, 52788.

Supreme Court of Florida.

March 1, 1979.

Action was brought against building owner and building contractor to recover for injuries which plaintiff sustained in the building while in the course of his employment. Contractor moved for summary judgment based on the statutory 12-year ban on lawsuits arising out of improvements to realty. The Circuit Court, Palm Beach County, Vaughn J. Rudnick, J., declared the limitation period unconstitutional. Review was sought by way of certiorari and appeal. The Supreme Court, England, C. J., held that statute providing that an action founded on the design, planning or construction of an improvement to realty must be brought against the professional engineer, registered architect or licensed contractor within 12 years after completion of the improvement violates constitutional right of access to courts insofar as it provides an absolute bar to lawsuits brought more than 12 years after events connected with construction of the improvements.

Affirmed.

Alderman, J., dissented and filed opinion in which Boyd and Overton, JJ., concurred.

Constitutional Law ⇐ 328

Limitation of Actions ⇐ 4(2)

Statute providing that an action founded on the design, planning or construction of an improvement to realty must be brought against the professional engineer, registered architect or licensed contractor within 12 years after construction of the improvement violates constitutional right of access to the courts insofar as it is an absolute bar to lawsuits brought more than 12 years after events connected with construction of the improvement; fact that passage of time aggravates difficulty of producing reliable evidence and that advances in technology tend to push industry standards higher do not justify such limitation. West's F.S.A. § 95.11(3)(c); West's F.S.A.Const. art. 1, § 21.

Justice W. Reid of Magill, Sevier & Reid, Palm Beach, and Edna L. Caruso, West Palm Beach, for petitioner-appellant.

Richard L. Martens of Cone, Owen, Wagner, Nugent, Johnson & McKeown, and Larry Klein, West Palm Beach, for respondents-appellees.

ENGLAND, Chief Justice.

In this proceeding we are called upon to review the constitutionality of section 95.11(3)(c), Florida Statutes (1975), insofar as it absolutely bars the right to bring suit for certain injuries incurred on real property unless the lawsuit is commenced within twelve years after the completion of the improvements which produced the injury. The relevant portion of the statute, which limits actions "founded on the design, planning, or construction of an improvement to real property," states:

> In any event the action must be commenced within 12 years after the date of actual possession by the owner,

> the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professinal engineer, registered architect, or licensed contractor and his employer.

In 1961, Overland and another company completed construction of a building in West Palm Beach. In 1975, more than twelve years after Overland's completion of construction, Jerry Sirmons was injured in the building in the course of his employment. He sued both the owner of the building and its builders. When Overland moved for a summary judgment based on the statutory twelve year ban on lawsuits, the quoted portion of section 95.11(3)(c) was declared unconstitutional by the trial court, thereby allowing Sirmons and the other respondents to proceed with the lawsuit notwithstanding the seeming bar of the statute. Overland has now sought to have the ruling reversed here, pursuant to article V, section 3(b)(3), Florida Construction, and *Burnsed v. Seaboard Coastline Railroad Co.*, 200 So.2d 13 (Fla.1974.

The trial court held the statute unconstitutional as violative of article I, section 21 of the Florida Constitution,[1] which provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

This constitutional mandate which has appeared in every revision of the state constitution since 1838,[2] has no counterpart in the federal constitution and derives its scope and meaning solely from Florida case law.[3] The polestar

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[1]The trial court also invalidated the statute on other constitutional grounds, but our disposition of this case makes it unnecessary to address those issues.

[2]*G.B.B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899, 901 (Fla. 3d DCA 1977).

[3]*See*, for example, *Carter v. Sparkman, 335 So.2d 802 (Fla.1976), cert. denied*, 249 U.S. 1041, 97 S.Ct. 740, 50 L.Ed.2d 753 (1977); *Sunspan Eng'r & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla.1975); *Scholastic Systems, Inc. v. LeLoup*, 307 So.2d 166 (Fla.1974); *Kluger v. White*, 281 So.2d 1 (Fla.1973); *Flood v. State ex rel. Homeland Co.*, 95 Fla. 1003, 117 So. 385 (1928).

decision for the construction of this provision is *Kluger v. White,* 281 So.2d I, 4 (Fla.1973), in which we held:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Based on *Kluger,* then, we must first decide whether the legislature, without providing any reasonable alternative, has abolished a statutory or common law right of action protected by article I, section 21,[4] and if so, whether that action is grounded both on an overpowering public necessity and an absence of any less onerous alternative means of meeting that need.

It is undisputed that a cause of action of the type asserted by Sirmons in this case — the right of an injured person to bring suit against a building contractor with whom he is not in privity for damages suffered as a result of alleged negligence in construction even after the owner has accepted the completed building — is one for which a right of redress is guaranteed by article I, section 21. This common law right, though not expressly recognized by statute until 1975,[5] was

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[4]§ 2.01, Fla.Stat. (1975), provided that "[t]he common and statute laws of England which are of a general and not a local nature . . . to be of force in this state . . . " The common law principles as adopted by section 2.01, however, have not been confined as of 1776, but have been held to be "designed for application to new conditions and circumstances." *State ex re. Burr v. Jacksonville Terminal Co.,* 90 Fla. 721, 744, 106 So. 576, 584 (1925).

[5]Ch. 74–382, § 7, laws of Fla., codified as § 95.11(3)(c), Fla.Stat. (Supp.1974) (effective January 1, 1975).

acknowledged as extant by this Court in 1959.[6] When the "access to courts" provision of the constitution was re-adopted in 1968, there existed a right of redress against contractors for the type of injury Sirmons suffered, provided, of course, that suit was commenced within four years[7] after the cause of action accrued by the occurrence of the injury.

Section 95.11(3)(c), insofar as is relevant to this proceeding, creates absolute immunity from suit for certain professionals and contractors connected with the construction of improvements to real property after the expiration of twelve years from the completion of the building. It unquestionably abolished Jerry Sirmons' right to sue Overland for his injuries and provided no alternative form of redress. The only remaining issue under *Kluger,* therefore, is whether the legislature has shown an overpowering public necessity for this prohibitory provision, and an absence of less onerous alternatives.

The legislature itself has not expressed any perceived public necessity for abolishing a cause of action for injuries occurring more than twelve years after the completion of improvements to real property. Overland suggests that several other states have adopted analogous limitations,[8] principally to counter a trend in the decisional law toward expanded liability for professional engineers, architects and contractors, and that the need for this type of statute is predicated on the difficulty of proof which naturally accompanies the passage of time.

We recognize the problems which inhere in exposing builders and related professionals to potential liability for an

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[6] *Slavin v. Kay,* 108 So.2d 462, 465—67 (Fla.1959). While the common law rule in effect in 1776 had severely limited a contractor's liability, a more expansive view was developed by our courts over the years as exceptions to the general rule. For a discussion of the evolution of contractor liability in Florida, *see Slavin,* and *see generally,* W. Prosser, Torts § 104, at 680—82 (4th ed. 1971).

[7] § 95.11(4), Fla.Stat. (1967).

[8] *See,* for example, *Carter v. Hartenstein,* 248 Ark. 1171, 455 S.W.2d 918 (1970), *appeal dismissed,* 401 U.S. 901. 91 S.Ct. 868. 27 L.Ed.2d 800 (1971); *Joseph v. Burns,* 260 Or. 493, 491 P.2d 203 (1971).

indefinite period of time after an improvement to real property has been completed. Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event, these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action. The legislation impermissibly benefits only one class of defendants, at the expense of an injured party's right to sue, and in violation of our constitutional guarantee of access to courts.

This analysis of section 95.11(3)(c) naturally calls for an explanation of our recent decision in *Bauld v. J. A. Jones Construction Co.,* 357 So.2d 401 (Fla.1978), where we sustained this very provision in the face of a constitutional challenge by one whose cause of action was curtailed, rather than wholly barred, by the effect of section 95..11(3)(c). In *Bauld,* unlike the present case, the injury occurred prior to the enactment of section 95.11(3)(c), at a time when the applicable statute of limitations provided only that suit must be commenced within four years.[9] When section 95.11(3)(c) took effect in 1975, two and one-half years of that period had elapsed, during which time an action could have been filed. Moreover, the savings clause of section 95.022[10] extended the deadline for instituting existing causes of action which would otherwise have been terminated by the new twelve

[9] § 95.11(4), Fla.Stat. (1971).

[10] Under section 95.022, any action barred by the new statute that would not have been barred under prior law could still be commenced at any time before January 1, 1976. Of course, this provision is of no benefit to Sirmons, or others similarly situated, whose right of action had not arisen prior to January 1, 1975.

year limitation for an additional year. Consequently, the absolute twelve year prohibitory provision did not operate to abolish Pearl Bauld's cause of action, but merely abbreviated the period within which suit could be commenced from four to three and one-half years. Although shortened, the time for bringing suit was found to be ample and reasonable; it was not forestalled altogether.

By contrast, Sirmons' cause of action was already barred by the twelve year limitation when it first accrued—that is, when his injuries occurred. No judicial forum would ever have been available to Sirmons if the twelve year prohibitory portion of the statute were given effect. Obviously, our decision as to the validity of the statute vis-a-vis Pearl Bauld would not operate to bar our declaring the same statute invalid vis-a-vis Jerry Sirmons.

Some mention should be made of decisions from other jurisdictions concerning similar statutes. In several cases relied on by Overland the courts reviewed statutory provisions similar to section 95.11(3)(c) under a much less exacting standard than our own constitution and decisional law require. The courts in those states essentially determined that their laws constituted a reasonable exercise of the police power, unrelated to any "access to courts" provision in their organic law or a subservient *Kluger* standard.[11]

A foreign decision which we do find persuasive, however, is *Saylor v. Hall,* 497 S.W.2d 218 (Ky.1973), in which a like statute was tested against a constitutional provision guaranteeing a right of access to courts similar to our own.[12] The Kentucky court recognized that a majority of other jurisdictions considering the issue had upheld the validity of such statutes against due process and equal protection

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[11] Several state statutes are identified in Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action,* 18 Catholic U.L.Rev. 361 (1969).

[12] Section 14 of the Constitution of Kentucky provides:

All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

attacks, but it nonetheless held that

> the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action.[13]

We similarly conclude that in Florida, as in Kentucky, the unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this "statute of repose" may be valid under state or federal due process or equal protection clauses.

We hold that, insofar as section 95.11(3)(c), Florida Statutes (1975), provides an absolute bar to lawsuits brought more than twelve years after events connected with the construction of improvements to real property, it violates article I, section 21 of the Florida Constitution. The order of the trial court is, therefore, affirmed.

It is so ordered.

ADKINS, SUNDBERG and HATCHETT, JJ., concur

ALDERMAN, J., dissents with an opinion, with which BOYD and OVERTON, JJ., concur.

ALDERMAN, J., dissenting.

Section 95.11(3)(c), Florida Statutes (1975), prevents a cause of action founded on the design, planning, or construction of an improvement to real property from arising against professional engineers, registered architects, and licensed contractors after twelve years from the date of actual possession by the owner, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his

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[13] 497 S.W.2d at 225.

employer. The majority, relying on *Kluger v. White,* 281 So.2d 1 (Fla.1973), holds this section to be in violation of article I, section 21, of the Florida Constitution, because the legislature failed to show an overpowering public necessity or that there was no less onerous alternative method.

Although the legislature, in section 95.11(3))c) did not make an express finding that this statute was enacted to meet an overpowering public necessity and that there is no less onerous alternative, it is apparent to me that the limitation on causes of actions imposed by this section was created to meet such a necessity. Some insight into the purpose of section 95.11(3)(c) may be found in *Grissom v. North American Aviation, Inc.,* 326 F.Supp. 465 (M.D.Fla.1971). In that case, the court was considering section 95.11(10), Florida Statutes (1969), the predecessor to section 95.11(3)(c), which provided a time limitation of twelve years within which actions may be brought against professional engineers and registered architects. The widow of astronaut Virgil Grissom sued for the wrongful death of her husband, who had been killed while engaged in a "ground test" of an apollo space capsule. One of the issues before the court was the intent of the legislature in passing the twelve-year limitation. In the absence of any legislative history, the court looked to a somewhat similar statutory proposal that had been before the United States House of Representative—H.R. Bill No. 4181. The court considered House Report No. 91—370, which accompanied H.R. Bill 4181. The report explained the basis for limiting to some definite period the time in which an action could be brought against the engineers, architects, or designers of improvements to realty. The reasons set out in the report are equally applicable to Florida and make clear the overpowering public necessity for section 95.11(3)(c). The report in part said:

> ". . . Architects who design buildings or improvements to real property, engineers who design and install

equipment, or contractors, who build the improvements under rigid inspection and conformity with building codes, may find themselves named as defendants in such damage suits many years after the improvement was completed and occupied.

Comparatively, modern architecture, engineering, and construction, with the new techniques, technology, and methods, may give the appearance of defective or unsafe conditions to older structures which conditions may be used as a basis for such damage suits. In such cases, the architectural plans used may have been discarded, copies of building codes in force at the time of design or construction may no longer be in existence and the persons who were individually involved may have deceased or may not be located. The purpose of the law is to provide a reasonable time and opportunity for a person who has suffered injury or damages to bring an action. To permit the bringing of such actions without any limitation as to time places the defendant in an unreasonable position if not imposing the impossibility of asserting a reasonable defense.

At hearings before your Committee, specific cases were mentioned to illustrate the need for the pending legislation. In one case an architectural firm designed an auditorium which was built in 1928. In 1965, a visitor to the auditorium fell on the stairway and was injured. Her allegation in a suit for damages against the owner was that her injury was due to the improper location of a handrail. The owner of the building, in turn, filed suit against the architect for alleged negligence in designing the stairway and handrail. Thus, 38 years after the completion of the construction the architectural firm is now defending itself against a $50,000 lawsuit.

In another instance an engineering firm designed a grain elevator which was built in 1934. The elevator was destroyed by an explosion in 1957. In 1959, the owner

sued the engineer for $250,000 alleging that the explosion was due to errors in the design of the ventilation system.

In the first case, none of the architects involved in the design of the auditorium is alive today but the architectural firm is being sued. The plans, specifications, and contracts may have been lost or destroyed. Old building codes, essential to the defense cannot be found. In the grain elevator case, the plaintiff in effect alleged that the engineer should have created in 1934 a ventilation system based on 1959 standards and technology.

Architects, engineers, and contractors have no control over an owner whose neglect in maintaining an improvement may cause dangerous or unsafe conditions to develop over a period of years. They cannot prevent an owner from using an improvement for purposes for which it was not designed. Nor can they prevent the owner of a building from making alterations or changes which may, years afterward, be determined unsafe or defective and appear to be a part of the original improvement."

326 F.Supp at 467—8. The federal district court determined that this same general intent was a major reason for passage of section 95.11(10) and similar statutes in other jurisdictions.

If the legislature, in enacting section 95.11(3)(c), had made findings similar to those quoted above, there could be little doubt that it would have shown an overpowering public necessity and the absence of a less onerous alternative. Even without such express recital, however, I believe the need for section 95.11(3)(c) is clear. In the present case, the time lapse was sixteen years, but it could just have well been thirty-two or sixty-four years. Without section 95.11(3)(c), there is no limitation on the number of years after which a suit could be brought against an engineer, architect, or contractor.

The legislature has balanced the conflicting interests and determined that twelve years is a reasonable time after which a cause of action may not arise. In doing so, it has not, in my opinion, violated article I, section 21 of the Florida Constitution. I would reverse the trial court's order.

BOYD and OVERTON, JJ., concur.

Dante A. BATTILLA and Gail A. Battilla, his wife, Appellants,

v.

ALLIS CHALMERS MANUFACTURING COMPANY and Travelers Insurance Company, Appellees.

No. 55908.

Supreme Court of Florida.

Dec. 11, 1980.

Rehearing Denied Feb. 12, 1981.

Product liability action was brought against manufacturer. The Circuit Court, Broward County, Lamar Warren J., held action barred by statute of limitations, and plaintiffs appealed. The Supreme Court held that statute as applied unconstitutionally denied plaintiffs access to the courts.

Reversed.

McDonald, J., dissented and filed opinion, in which Overton and Alderman, JJ., concurred.

Constitutional Law ⇐ 328

Limitation of Actions ⇐ 4(2)

Statute barring plaintiff's suit against manufacturer brought more than 12 years after date of sale as applied, unconstitutionally denied plaintiffs access to court under Florida Constitution. West's F.S.A.Const. Art 1, § West's F.S.A. § 95.031.

Walter G. Campbell, Jr. of Krupnick & Campbell, and Nancy Little Hoffmann, Fort Lauderdale, for appellants.

Steven R. Berger of Carey, Dwyer, Cole, Selwood & Bernard, Miami, for appellees.

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. The judgment passed upon validity of a state law. The notice of appeal was filed January 12, 1979. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. (1972).

The circuit court held that this product liability action was barred by the statute of limitations, section 95.031, Florida Statutes (1975). We reverse on the authority of *Overland Construction Co. v. Sirmons,* 369 So.2d 572 (Fla.1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution. *See also Purk v. Federal Press Co.,* 387 So.2d 354 (Fla.1980); *Bauld v. J. A. Jones Construction Co.,* 357 So.2d 401 (Fla.1978).

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD and ENGLAND, JJ., concur.

McDONALD, J., dissents with an opinion, with which OVERTON and ALDERMAN, JJ., concur.

McDONALD, Justice, dissenting.

I disagree that there is anything unconstitutional about section 95.031(2). Although I recognize that the language in *Overland*[1] is such that it could be authority to extend its

[1] *Overland Construction Co., Inc. v. Sirmons,* 369 So.2d 572 (Fla.1979).

application to this section. I would limit that holding to section 95.11(3)(c). I do this not for any reason expressed or exceptions made in *Overland* but because a twelve-year limitation may be reasonable for liability for manufactured products and not for liability for improvements to real property.

Until the decision of *Matthews v. Lawnlite Co.*, 88 So.2d 299 (Fla.1956), Florida recognized the early common law rule which inhibited recover where there was no privity of contract. Since then the law of products liability has evolved to the point that we now recognize liability of a manufacturer which sells a product in a defective condition unreasonably dangerous to the user or consumer.[2]

This developing liability of a manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold a manufacturer should be subject to liability for an injury whenever caused by that product. It could also be argued that such liability would place an onerous burden on industry and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufactured products.

The legislature, in enacting section 95.031(2), has determined that perpetual liability places an undue burden on manufacturers. It has determined that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturers of products. I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than most manufactured products there is a distinction in the categories of liability exposure between those sought to be limited by section 95.11(3)(c), struck down in *Overland*, and those listed in section 95.031(2).

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[2] *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976).

I would sustain the trial judge's actions in upholding section 95.031(2), Florida Statutes, which statute restricts actions against a manufacturer to twelve years from the date of the sale of the product.

OVERTON and ALDERMAN, JJ., concur.

DISTRICT COURT OF APPEAL
FIRST DISTRICT

Tallahassee, Florida 32301
Telephone No. (904) 488-6152

January 13, 1986

Case No. BK-198

EFFIE DELL CASSIDY, et al

Appellant/Petitioner

vs.

THE FIRESTONE TIRE AND RUBBER COMPANY, et al.

Appellee/Respondent

ORDER

Pursuant to Fla.R.App.P. 9.125, this court certifies the following question as one requiring immediate resolution by the Supreme Court because it is of great public importance and will have a great effect on the proper administration of justice throughout the state:

WHETHER THE RULE ANNOUNCED IN *PULLUM v. CINCINNATI, INC.*, 476 So.2d 657 (FLA. 1985) IS APPLICABLE TO CASES FILED PRIOR TO PUBLICATION OF THAT OPINION.

Supreme Court of Florida

TUESDAY, JANUARY 21, 1986

EFFIE DELL CASSIDY, et al.,

Petitioners,

v.

FIRESTONE TIRE AND RUBBER COMPANY, et al.,

Respondents.

CASE NO. 68,160

District Court of Appeal,
1st District - BK-198

The District Court of Appeal, First District, pursuant to article V, section 3c(5), Florida Constitution, has certified a final judgment of the circuit court in and for Escambia County, Florida, as one requiring immediate resolution by this Court because it is of great public importance and will have a great effect on the proper administration of justice throughout the state.

The district court of appeal's request to invoke our discretionary jurisdiction is denied.

ADKINS, Acting C.J., OVERTON, McDONALD and SHAW, JJ., concur
EHRLICH and BARKETT, JJ., dissent

Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1392

In The

Supreme Court of the United States

October Term, 1985

RICHARD PULLUM,

Appellant,

v.

CINCINNATI, INC., ET AL.,

Appellees.

On Appeal from the Supreme Court of Florida

MOTION TO AFFIRM OR DISMISS

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28 U.S.C. § 1257(2) 1

Appellee, *Cincinnati, Inc., Etc., Et Al.,* by and through its undersigned attorneys, respectfully moves this Court for an Order affirming the August 29, 1985 decision of the Florida Supreme Court, or, in the alternative, for an Order dismissing the Appeal filed by the Appellant on February 18, 1986.

As grounds therefore, Appellee would show the Court:

1. That the Order of the Florida Supreme Court should be affirmed because that Court reached its decision from a correct analysis of Florida law, especially Florida constitutional law,

2. That the Order of the Florida Supreme Court should be affirmed because it rests on adequate State grounds,

3. That the Appeal should be dismissed because it is not within the Court's jurisdiction,

4. That the Appeal should be dismissed because it fails to present a substantial federal question,

5. That the Appeal should be dismissed because the Florida Supreme Court Judgment rests on adequate and independent non-federal basis, and

6. That the Appeal should be dismissed because it fails to raise other grounds as reasons why the Court should accept the Appeal.

Appellee also disputes the assertion on page 2 of the Jurisdictional Statement that the Appeal was made under 28 U.S.C. Section 1257(2) "since the State Court purports to eliminate what it acknowledges is a valid equal protection argument". Nowhere in its opinion did the Florida Supreme Court acknowledge a valid equal protection argu-

ment. For that and other grounds, the Appeal should be dismissed.

———o———

MOTION TO AFFIRM

The Florida Supreme Court decision should be affirmed because the Court properly considered and analyzed Florida law.

The Florida Supreme Court properly considered Florida precedents in its analysis and decision in *Pallum v. Cincinnati, Inc., et al.*, 476 So.2d 657 (Fla. 1st DCA 1985). The test for whether a classification system denies equal protection depends upon the nature of the right allegedly denied. Where the right is fundamental (such as speech or worship) or suspect (such as race or religion), this Court has used a strict scrutiny test. Where the classification system involved quasi-suspect classes, this Court has used a substantial relationship test. In all other cases, this Court has used a minimum scrutiny test.

The Federal Courts have recognized that although there is no express right of access to the courts mentioned in the United States Constitution, such a right exists based on the Due Process Clause, the Privileges and Immunity Clause and the First Amendment Right to Petition. *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). Federal Courts have required that such access be meaningful, adequate and effective. *Id.*

By these standards, Appellant was not denied the right of access to the courts. Eighteen months after discovery of the injuries was more than adequate time in which to commence action. The access available to the Appellant would have been meaningful and effective had Appellant taken advantage of it.

The Federal Courts have not declared that among the fundamental rights is the right to a forum in a civil action. Therefore, a minimum scrutiny test, such as the one employed by the Florida Supreme Court in this case, would be employed to determine whether the classification system created under Florida Statute 95.031(2) denied equal protection to the Appellant.

Unlike the United States Constitution, the Florida Constitution, Article I, Section 21, counts among the fundamental rights that of access to the courts. Despite the fact that a fundamental right is involved, the Florida Courts have used a minimum scrutiny test to determine whether statutes of limitations or repose creates a classification system which denies equal protection. Under such a test, a statutory classification will be held unconstitutional only if it results in treatment so disparate as to be wholly arbitrary, and a classification will not be struck down because it results incidentally in some inequality or is not drawn with mathematical precision. *In re: Estate of Greenberg,* 390 So.2d 40 (Fla. 1980) (appeal dismissed 101 S. Ct. 1475 (1980). The minimum scrutiny test was also used in *Purk v. Federal Press Company,* 387 So.2d 354 (Fla. 1980), to determine whether Florida Statute 95.031 (2) denied equal protection.

Minimum scrutiny uses the "rational basis test", by which a Court should inquire only whether it is conceivable that a classification bears some rational relationship to a legitimate state objective. *Florida High School Activities Association v. Thomas by and through Thomas,* 434 So.2d 306 (Fla. 1983). The "rational basis test" has also been called the "some reasonable basis test" which the First District Court of Appeal of Florida recently reaf-

firmed was the proper test for purposes of minimum scrutiny under the Equal Protection Clauses of the Federal and State Constitutions. *Sasso v. Ram Property Management*, 431 So.2d 204 (Fla. 1st DCA 1983). Thus, the test for the classification system set up by Florida Statute 95.031 was whether it bore some reasonable relationship to a legitimate state objective.

The Florida Supreme Court expressly found that, by enacting Florida Statute 95.031(2) the Florida Legislature reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product.

Also, the Florida Supreme Court's decision adopted Justice McDonald's dissent in *Batilla v. Allis Chalmers Manufacturing Company*, 392 So.2d 874 (Fla. 1980), which said:

> I perceive a rational and legitimate basis for the Legislature to take this action, particularly in view of relatively recent developments in expanding the liability of manufacturers.

Batilla v. Allis Chalmers Manufacturing Company, at 875. Based on that reasoning, the Florida Supreme Court held the classification originally established by the statute bears a rational relationship to a proper state objective. *Pullum v. Cincinnati, Inc., et al.*, supra.

Also, Appellant conceded, as noted by the Florida Supreme Court in its decision, that the application of Florida Statute 95.031(2) did not deny him his right of access to the courts as guaranteed by the Florida Constitution. Thus, Appellant concedes that his right to due process has not been denied or violated.

Based on the foregoing, Appellee asserts that the decision by the Florida Supreme Court should be affirmed because it rests on proper consideration and analysis of Florida Constitutional Law.

———o———

MOTION TO DISMISS—LACK OF JURISDICTION

Appellee asserts that this Appeal should be dismissed because appellant lacks the proper standing to raise the issues sought to be raised in this Appeal.

Appellant asserts the standing of those persons injured closer to the end of the twelve year limitations period, where those persons would not have had meaningful access to the Courts.

Appellee asserts that Appellant's standing is distinguishable from the standing of those persons. Persons injured closer to the end of the twelve year period would have been denied their rights to due process, whereas Appellant has admitted that the statute, as enacted, did not deny him due process.

One who is not himself denied some constitutional right or privilege may not be heard to raise constitutional questions on behalf of some other person who may at some future time be affected. *Steele v. Freel*, 25 So.2d 501 (Fla. 1946). Appellant has standing to challenge Florida Statute 95.031(2) only insofar as it applies to persons: (1) injured by a product between eight and twelve years after it was delivered to the original user, (2) with time to exercise due diligence to discover the facts leading to the injuries, and (3) with adequate time to commence action.

Decisions by courts in other states support Appellee's view that Appellant lacks the standing to challenge

Florida Statute 95.031(2) on an equal protection basis, by asserting the standing of an injury to a hypothetical plaintiff. In *Hatheway v. Secretary of the Army,* 641 F.2d 1376 (10th Cir. 1981), the court said that a person to whom a statute may be constitutionally applied will not be heard to challenge that statute on the grounds that it may conceivably be applied unconstitutionally to others. Similarly, one to whom application of the statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or situations in which its application might be unconstitutional. *Myron v. Martin,* 670 F.2d 49 (5th Cir. 1982). As a general rule, a party lacks standing to assert the constitutional rights of another. *Clements v. Fashing,* 102 S. Ct. 2836 (1982). There is only one recognized situation in which a party may assert the constitutional rights of another. The Rule of Standing, as expressed in the preceding paragraph, does not apply where a statute may be interpreted as reaching constitutionally protected speech. *United States v. Damond,* 676 F.2d 1060 (5th Cir. 1982). In other words, a litigant can assert the standing of one against whom an overbroad statute would operate to "chill" constitutionally protected speech. Appellant's challenge is not based on the First Amendment Right of Freedom of Speech. Therefore, the Rule of Standing would apply in Appellant's argument.

Also, a state court cannot confer standing before this Court on a party who would otherwise lack such standing. *Orr v. Orr,* 440 U.S. 268 (1979).

Therefore, Appellee asserts that Appellant lacks standing to raise these issues before this Court, and that this Appeal should be dismissed for lack of jurisdiction.

MOTION TO DISMISS—INDEPENDENT AND ADEQUATE NON-FEDERAL GROUNDS

This Appeal should be dismissed because the Florida Supreme Court judgment rests on independent and adequate state grounds.

The United States Supreme Court's power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Chandler v. Florida,* 449 U.S. 560 (1981). This Court will not review judgment of state courts which rests upon adequate and independent state grounds. *Smith v. Smith,* 366 U.S. 210 (1961).

The Florida Supreme Court reached its decision based solely on a consideration of whether Florida Statute 95.031 (2) unconstitutionally violated Article I, Section 21, of the Florida Constitution, and also the role of the Florida Legislature in enacting that statute based on public policy. The Florida Supreme Court recognized that the legislature reasonably decided that perpetual liability places an undue burden on manufacturers, and that twelve years from the date of sale was a reasonable time for exposure to liability. Further, the Court applied the correct test for determining the constitutional violation, and held that the classifications set up under Statute 95.031(2) bore a rational relationship to a legitimate state objective—elimination of perpetual liability for manufacturers.

The Florida Supreme Court opinion in *Pullum v. Cincinnati, Inc., et al.,* supra, does not mention anything about the federal equal protection challenge asserted by the Appellant. The opinion addresses exclusively the question of whether the classifications under Statute 95.031(2) violates the Florida Constitution and whether those classifi-

cations bore a rational relationship to a legitimate state objective.

If the federal question asserted is not mentioned in the opinion by the state court, the test applied in adequate state ground cases are used to determine whether the federal question was necessarily decided or instead was passed over on state grounds. Wright, *Federal Practice and Procedure*, 1985 Supplement, Section 4022 at 440 (1977).

The "correct reasoning" of Justice McDonald led the Florida Supreme Court to decide that Statute 95.031(2) is not unconstitutionally violative of Article I, Section 21, of the Florida State Constitution. *Id.* at 660. In fact, the entire opinion of the Florida Supreme Court was based solely on consideration of Florida public policy, a Florida statute of repose, and the Florida State Constitution.

The state ground described by the Florida Supreme Court is of sufficient breadth to support the judgment. *Abie State Bank v. Bryan*, 282 U.S. 765 (1931). The judgment rests on prior state considerations of equal protection challenges to 95.031(2).

The state ground described by the Florida Supreme Court is not inconsistent with federal law and is not contrary to the Supremacy Clause of the United States Constitution. *Jankovitz v. Indiana Toll Road Commission*, 379 U.S. 487 (1965). With regard to equal protection claims, the function of the courts is not to substitute their evaluation of legislative facts for that of the legislature. *Minnesota v. Cloverleaf Creamery Company*, 449 U.S. 456 (1981). The legislature has the prerogative to treat product liability cases differently from other cases, and the

inquiry into the classification system is whether or not product liability cases are different from other cases. The Florida Supreme Court recognized that the Florida Legislature decided that the public policy of Florida is that product liability cases are different.

The state ground described by the Florida Supreme Court is tenable and supported by the record below. All reasons described by the Florida Supreme Court in its opinion were addressed by the arguments and briefs of Appellee.

The state ground described by the Florida Supreme Court was well established. The Court cited *Purk v. Federal Press Company*, 387 So.2d 354 (Fla. 1980); *Overland Construction Company v. Sirmons*, 369 So.2d 572 (Fla. 1979); *Diamond v. E. R. Squibb and Sons, Inc.*, 397 So.2d 671 (Fla. 1981); and *Bauld v. J. A. Jones Construction Company*, 357 So.2d 401 (Fla. 1978). Those cases clearly address the questions asserted by the Appellant.

The state ground described by the Florida Supreme Court has fair and substantial support. Those cases cited in the immediately preceding paragraph show that the decision is supported by prior state practice and is consistent with prior determinations of the Florida Supreme Court.

The state ground described by the Florida Supreme Court is reasonable. *Douglas v. Alabama*, 380 U.S. 415 (1965). The court stated that it approved the result only of this decision (describing the decision by the Florida First District Court of Appeal in affirming the trial court's summary judgment that appellant's claim was barred by the twelve year statute of repose). The Florida Supreme

Court stated that under the facts of appellant's case, access to the courts was not denied and that appellant was not denied the equal protection of the laws, notwithstanding appellant's attempts to assert the standings of other persons who may have been denied equal protection.

The state ground described by the Florida Supreme Court served a legitimate state purpose. As stated by the court, the legislature determined that the twelve year statute of repose served the legitimate state purpose of preventing perpetual manufacturer's liability. As previously stated by this Court in *Chase Securities Corporation v. Donaldson,* 325 U.S. 304 (1945):

> The history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of control.

325 U.S. at page 314.

Appellee would also show that the failure to comply with a state statute of limitations or repose is a sufficient and independent state ground which bars further review in this Court. *Rogers v. Jones,* 214 U.S. 196 (1909).

Based on the foregoing reasons, appellee contends that the judgment of the Florida Supreme Court rests on independent and adequate state grounds, and that the Appeal should be dismissed.

———o———

MOTION TO DISMISS—NO FEDERAL QUESTION

Appellee contends that the appeal should be dismissed because a federal question was not presented and decided by the Florida Supreme Court.

In order for this Court to have jurisdiction, it must affirmatively appear from the record, at least by clear and necessary implication, that a substantial federal question was presented to the state court and passed upon by that court. *Yazoo and M. R. Company v. Adams,* 180 U.S. 41 (1901). If nothing in the record indicates that a federal question was presented to the state court, this Court will not take judicial notice that a federal question might have been involved in the case. *Id.*

Appellee acknowledges that the Appellant mentioned a constitutional question in oral arguments and briefs. However, Appellee contends that the Appeal should be dismissed because there is nothing in the record to show that the federal question was ever effectively presented for consideration before the court or that the federal question was expressly or impliedly decided by the Florida Supreme Court.

The Florida Supreme Court reached its decision based solely on consideration of whether Florida Statute 95.031 (2) unconstitutionally violated Article I, Section 21, of the Florida Constitution. It also considered the public policy of Florida as expressed by the Florida Legislature in enacting that statute, and also prior case law which discussed the equal protection argument asserted by the Appellant. Nowhere in its opinion did the Florida Supreme Court address, expressly or by clear implication, the federal equal protection question.

If the highest state court failed to expressly pass upon a federal question, it is assumed that the omission was due to a failure to properly present the federal question in the state courts, unless the Appellant can affirmatively show

to the contrary. *Street v. New York*, 394 U.S. 576 (1969). Appellee asserts that the Appellant has failed to affirmatively show that the federal question was presented to the Florida Supreme Court.

Also, Appellant does not have standing to appeal these issues. As the Florida Supreme Court recognized in its opinion, Appellant admitted that the statute, as originally enacted, did not deny him equal protection because the classifications created by the statute bore a rational relationship to a legitimate state objective. *Pullum v. Cincinnati, Inc., et al.*, supra.

Appellant attempts to assert the standing of either a hypothetical plaintiff or someone who was injured closer to the end of the twelve year period involved with this statute in repose. One cannot invoke the appellate jurisdiction of this Court to vindicate the right of a third party or a hypothetical plaintiff or some other person who may at some future time be affected. *Hanson v. Denckla*, 357 U.S. 235 (1958); *Steele v. Freel*, supra.

For the foregoing reasons, Appellee contends that Appellant did not raise a federal question which was presented and considered and decided by the Florida Supreme Court, and that the Appeal should be dismissed because the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on.

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MOTION TO DISMISS—OTHER GROUNDS

Appellee contends that there are other grounds upon which this Appeal should be dismissed.

Appellant asserts that the Florida Supreme Court decision receding from *Batilla v. Allis Chalmers Manufacturing Company,* supra, did not eliminate the premise of Appellant's federal equal protection argument. That same contention was considered and rejected by the Florida Supreme Court in Appellant's Motion for Rehearing before that court.

However, Appellant advances additional arguments in an attempt to invoke the Appellate jurisdiction of this court. Appellant asserts that:

> "We come to correct the court's error, not to criticize the court unduly."

Appellant's jurisdictional statement, page 10.

However, despite the disclaimer, Appellant proceeds to criticize the court unduly. Appellant accuses the court of reaching a "facile decree", under the pressure of the impending resignation of Justice Alderman, author of the opinion of the *Pullum* decision. Appellant asserts that the "push to clear the cases in which the resigning justice was participating may explain how the court, speaking through him, mistakenly said it had, after the fact, 'eliminated' a federal equal protection challenge." (Appellant's jurisdictional statement, page 11).

The opinion by the Florida Supreme Court did not say that its opinion eliminated a "federal" equal protection challenge. Instead, the court said:

> "Since we have receded from *Batilla,* it logically follows that Section 95.031(2) does not deny equal protection. This is so because the classification originally established by the statute bears a rational relationship to a proper state objective. In receding from *Batilla,* we have eliminated the premise of Pullum's equal protection argument."

Pullum v. Cincinnati, Inc., et al., at page 660. The language does *not* say that the *federal equal protection* premise had been removed. Instead, as Appellee has demonstrated, the Florida Supreme Court based its decision on independent and adequate state equal protection grounds.

Appellee also objects to the Appellant's attack on the integrity of the Florida Supreme Court. It is impertinent and disrespectful to suggest that the justices on the Florida Supreme Court acted more in the interest of expediency than of justice.

Appellant carries this even further, and says:

> We understand what happened below. A new majority had emerged on the Florida Court. This majority liked the social policy expressed by the statute of repose, but the makeup of the court was about to change again. Richard Pullum's plight presented perhaps the last opportunity for the court to resurrect this statute.

Appellant's jurisdictional statement, pages 16-17.

Not only is Appellant impertinent and disrespectful in presuming to conclusively know the reasoning behind the opinion by the Florida Supreme Court, but Appellant also attributes wrongful motives to the Florida Supreme Court. The Florida Supreme Court only decided whether Statute 95.031(2) was constitutional, not whether *Pullum*

v. Cincinnati, Inc., et al., supra, afforded one last opportunity for the court to "resurrect" the statute.

Appellant also attacks the right of the Florida Supreme Court to recede from its prior decision and overrule an express holding of unconstitutionality. Appellant said that the court "offered no justification for making this radical change", "disregarded the fact that the legislature had accepted *Batilla*", and "discarded the unique restriction by dropping, apparently for this one statute, the overpowering public necessity requirement." Appellant's jurisdictional statement, page 9.

However, Appellant later states:

> Pullum does not quarrel in this court with that court's right to reverse itself and change the rule for the future.

Appellant's jurisdictional statement, at page 17. Appellant refutes his own argument by accusing the court of doing something which it could not do and then admitting that the court had the right to do that very thing.

Concerning the alleged discarding of the overpowering public necessity requirement for access to the courts, Appellant would point out that this standard does not apply in equal protection challenges. As has been shown, the equal protection challenge in this case called for a minimum scrutiny, or rational basis test, which the court clearly adopted in its opinion.

Appellant also contends that Appellee misstates the general rules concerning retroactive application of the court's decision. The general rule states that the rule in *Pullum v. Cincinnati, et al.*, would be applicable in:

1. Cases already commenced but in which trial has not yet begun,
2. Cases on appeal in which the time bar of Florida Statute 95.031(2) has been properly and appropriately made a question of appellate review,
3. In all cases commenced after the decision is final.

Linder v. Combustion Engineering Company, 342 So.2d 474 (Fla. 1977).

This case fits the second category. Appellee raised the time bar of 95.031(2) as a proper affirmative defense and appropriately made it a question of appellate review. The Florida Supreme Court was not prohibited from changing a prior decision construing the constitutionality of a statute. *Carter v. State,* 155 So.2d 787 (Fla. 1963), held that two abortion statutes were constitutional. However, nine years later, in *State v. Barquet,* 262 So.2d 431 (Fla. 1972), the Florida Supreme Court held that those same two statutes were unconstitutional.

Appellee contends that Appellant attempts to paint too broad a picture. Appellant says that dismissal of this Appeal would give state courts the green light to circumvent the Fourteenth Amendment. For reasons stated in these motions, Appellee contends that affirmance or dismissal would do no such thing. Each case has to be reviewed on its own merits.

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CONCLUSION

The decision by the Florida Supreme Court in *Pullum v. Cincinnati, Inc., et al.*, 476 So.2d 657 (Fla. 1985), should be affirmed because the Florida Supreme Court correctly considered Florida law and public policy. In the alternative, the Appeal should be dismissed because it fails to present a substantial federal question, or that the Federal question sought to be reviewed was not timely or properly raised and was not expressly passed upon, or that the judgment rests on adequate and independent state grounds, or for other reasons stated in these motions.

Respectfully submitted,

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Attorney for Appellees

APPENDIX

No. A-558

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

RICHARD PULLUM, APPELLANT

v.

CINCINNATI, INC., ETC., ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

APPENDIX TO
JURISDICTIONAL STATEMENT

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Attorney for Appellant

Richard PULLUM, Petitioner

CINCINNATI, INC. the Cincinnati Shaper Company, Sti-Gro Corp., f/k/a Harry P. Leu Machinery Corp. dissolved Florida corporation, Robert H. Stine, Eugenie E. Stine and Robert E. Groth, as directors and/or trustees of Sti-Gro First Corp., Respondents.

No. 66198

Supreme Court of Florida
Aug. 29, 1985.

Rehearing Denied Nov. 4, 1985.

The District Court of Appeal, 458 So.2d 1136, certified as being of great public importance, question whether products liability statute of repose denied equal protection to plaintiff who filed suit against manufacturer more than 12 years from date of delivery of product to original purchaser. The Supreme Court, Alderman, J., held that statute, which provides, inter alia, that an action for products liability must be begun within 12 years after date of delivery of completed product to its original purchaser does not deny equal protection under the state Constitution.

Decision approved.

Adkins and Overton, JJ., dissented.

Constitutional Law 249(3)
Limitation of Actions 4(2)

Statute of repose, West's F.S.A. § 95.-031(2), provising inter alia, that actions for products liability must be begun within 12 years after date of delivery of completed product to its original purchaser does not deny equal protection guaranteed by West's F.S.A. Const. Art. 1, § 21; receding from *Batilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874.

Wayne Hogan of Brown, Terrell, Hogan & Ellis, Jacksonville, for petitioner.

Michael J. Arington of Ellis E. Neder, Jr., P.A., Jacksonville for respondents.

Cathy Jackson Burris, Ft. Lauderdale for Academy of Florida Trial Lawyers, amicus curiae.

ALDERMAN, Justice.

We review the decision of the District Court of Appeal, First District, in *Pullum v. Cincinnati,* 458 So.2d 1136 (Fla. 1984) wherein the district court certified the following question as being of great public importance:

> Does section 95.031(2), Florida Statutes deny equal protection of the laws to persons such as appellant [petitioner] who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

Id. at 1140. The First District, on the authority of several decisions of our Court, answered this question in the negative and affirmed the summary judgment against Pullum. We approve the result only of this decision.

Richard Pullum was injured in April 1977 while operating a Cincinnati press brake machine which had been delivered to the original purchaser in November 1966. He filed suit against the manufacturer in November 1980, more than twelve years from this delivery date but within the applicable four-year statute of limitations. The trial court granted summary judgment against Pullum on the basis that his action was barred by section 95.031(2), Florida Statutes (1979). This statute of repose provides:

> (2) Actions for products liability and fraud under s. 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action

> were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

The district court affirmed. Relying on *Purk v. Federal Press Co.*, 387 So.2d 354 (Fla. 1980), it held that the reduction by this statute of repose of the time within which he was required to file suit after his accident from four years to one and one-half years did not deny him equal protection of the laws. It explained that the fact that Mrs. Purk's injury occurred prior to the enactment of section 95.031 and was covered by a one-year savings clause, while Pullum's injury occurred after the effective date of the act, did not furnish Pullum with any equal protection argument materially different from that of Mrs. Purk's. Pullum conceded that application of section 95.031(2) did not deny him his right to access to the courts guaranteed by article I, section 21 of the Florida Constitution.

Pullum asks this court to quash the decision of the First District and to hold that section 95.031(2), as "amended" by this Court's decision in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980), violates his right to equal protection of the laws. In view of this decision, holding that where section 95.031(2) barred a right of action before it ever existed, it was unconstitutional as applied because it denied access to the courts, Pullum argues that the statute now irrationally applies to a very limited class of persons, *i.e.*, those per-

sons injured during a time period of eight to twelve years after delivery of the completed product to its original purchaser. Those injured after twelve years have a full four years within which to bring their actions.

As originally enacted, Pullum maintains, this statute did not deny equal protection because the classifications created by the statute bore a rational relationship to a legitimate state objective. Its legislatively intended purpose was to prevent perpetual liability. It affected all victims of defective products delivered more than eight years before injury. He claims that this statute denied equal protection only after this Court's decision in *Battilla* which gave this statute a limited continuing application to only a small arbitrarily or accidentally chosen class of defective victims and that it now no longer bears rational relationship to a legitimate state objective.*

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* Pullum also refers to *Diamond v. E. R. Squibb and Sons, Inc.*, 397 So.2d 671 (Fla.1981), as being in accord with *Battilla*. In *Diamond*, we held that the operation of section 95.031(2) operated to bar a cause of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But *Diamond* presents an entirely different factual context than existed in either *Battilla* or the present case where the product first inflicted injury many years after its sale. In *Diamond* the defective product, a drug known as diethystilbestrol produced by Squibb was ingested during plaintiff mother's pregnancy shortly after purchase of the drug between 1955-1956. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiff's claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond*. Were it applicable, there certainly would have been a denial of access to the courts.

Pullum further urges that this Court find that this case involves an entirely different equal protection challenge than was made in *Purk*. Mrs. Purk's argument, he states, was strictly directed to the legislature's choice of twelve years as an ultimate cutoff point to prevent perpetual liability.

We have reconsidered our decision in *Battilla* wherein we expressly held:

> The circuit court held that this product liability action was barred by the statute of limitations, section 95.031, Florida Statutes (1975). We reverse on the authority of *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla.1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution. *See also Purk v. Federal Press Co.*, 387 So.2d (Fla. 1980); *Bauld v. J.A.Jones Construction Co.*, 357 So.2d 401 (Fla. 1978).

392 So.2d at 874. We recede from this decision and hold that section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida Constitution. The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product. Justice McDonald, in maintaining the constitutional validity of section 95.031 (2) in his dissenting opinion in *Battilla*, correctly reasoned as follows:

> Until the decision of *Matthews v. Lawnlite Co.*, 88 So.2d 299 (Fla.1956), Florida recognized the early common law rule which inhibited recovery where there

was no privity of contract. Since then the law of products liability has evolved to the point that we now recognize liability of a manufacturer which sells a product in a defective condition unreasonably dangerous to the user or consumer.

This developing liability of a manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold a manufacturer should be subject to liability for an injury whenever caused by that product. It could also be argued that such liability would place an onerous burden on industry and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufacturer products.

. . . I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than most manufactured products there is a distinction in the categories of liability exposure between those sought to be limited by section 95.11(3)(c), struck down in *Overland*, and those listed in section 95.031(2).

The premise of Pullum's argument is that the "amendment" of this statute by *Battilla* has rendered it violative of his right to equal protection of the laws. He concedes that as enacted, this statute was capable of withstanding an equal protection challenge. Since we have receded from *Battilla*, it logically follows that section 95.031(2) does not deny equal protection. This is so because the classification originally established by the statute bears

a rational relationship to a proper state objective. In receding from *Battilla*, we have eliminated the premise of Pullum's equal protection argument.

Accordingly we hold that the granting of summary judgment by the trial court was proper, and we approve the result of the district court's decision which affirms the summary judgment.

It is so ordered.

SUPREME COURT OF FLORIDA
MONDAY, NOVEMBER 4, 1985

RICHARD PULLUM,

Petitioner,

v.

CINCINNATI, INC., et al.,

Respondents.

CASE NO. 66,198

District Court of Appeal,

1st District - No. AU-62

Upon consideration of the Motion for Rehearing filed by attorney for petitioner and the Motion for Rehearing and Clarification filed by attorneys for Amicus Curiae, Academy of Florida Trial Lawyers, and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied.

BOYD, C.J., McDONALD, EHRLICH and SHAW, JJ., concur

OVERTON, J., I find nothing new in the petition for rehearing; consequently, I am bound to deny rehearing even though disagree with the majority opinion and would allow a claim to be brought within the four-year statute of limitations period if the cause of action accrued within the twelve-year period of the statute of repose.

ADKINS, J., dissents

Richard PULLUM, Appellant,

v.

CINCINNATI, INCORPORATED, the Cincinnati Shaper Company, Sti-Gro First Corp., formerly known as Harry P. Leu Machinery Corporation, a dissolved Florida corporation, Robert H. Stine, Eugenie E. Stine and Robert E. Groth, as directors and/or trustees of Sti-Gro First Corp., Appellees.

No. AU-62.

District Court of Appeal of Florida,
First District.

Sept. 26, 1984.

Rehearing Denied Nov. 16, 1984.

Worker injured while operating press brake machine filed suit against manufacturer and others on basis of negligence, implied warranty, and strict liability. The Circuit Court, Duval County, John M. McNatt, J., entered summary judgment against worker on basis that claim was barred by statute of repose, and worker appealed. The District Court of Appeal, Nimmons, J., held that: (1) application of statute of repose to worker reducing time within which he was required to file suit after accident from four years to a little over one and one-half years did not amount to proscribed limitation of access to courts under State Constitution, and (2) fact that operation of statute of repose reduced otherwise available four-year limitation period to period of a little more than one and one-half years in which to file suit, whereas those persons injured by products delivered 12 years or more before injury would continue, by application of holding in Florida Supreme Court case finding that barring

of cause of action under similar statute of repose before cause of action accrued was repugnant to constitutional guarantee of right access to courts, to have four years within which to file suit, was not a denial of equal protection.

1. *Constitutional Law 328*

Limitation of Actions 4(2)

Application of statute of repose to worker who, after being injured while operating press brake machine, filed suit against manufacturer of machine and others on basis of negligence, implied warranty and strict liability within four-year limitations period for such action, but more than 12 years after a delivery of press brake to original purchaser, did not amount to proscribed limitation of access to courts under State Constitution, even though application of statute of repose reduced period within which worker was required to file suit after accident from four years to a little over one and one-half years. West's F.S.A. Const. Art. 1, § 21; West's F.S.A. §§ 95.031(2), 95.11(3)(e).

2. *Constitutional Law 249(3)*

Limitation of Actions 4(2)

Fact that operation of statute of repose reduced otherwise available four-year limitation period for worker injured by equipment installed within 12 years of injury to period of a little more than one and one-half years in which to file suit against manufacturer, whereas those persons injured by products delivered 12 years or more before injury would continue, by application of holding in Florida Supreme Court case finding that barring of

cause of action under statute of repose before cause of action accrued is repugnant to constitutional guarantee of right of access to courts, to have four years within which to file suit, was not a denial of equal protection U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 21; West's F.S.A. § 95.031(2).

Wayne Hogan of Brown, Terrell & Hogan, Jacksonville, for appellant.

Ellis E. Neder, Jr., Jacksonville, for appellees.

NIMMONS, Judge.

Richard Pullum, plaintiff below, appeals a summary judgment entered against him on the basis that his claim was barred by Section 95.031(2), Florida Statutes,[1] a statute of repose, We affirm.

On April 29, 1977, Pullum, while operating a Cincinnati pressbrake machine, was injured by the machine. On November 26, 1980, Pullum filed suit against the manufacturer and others on the basis of negligence, implied warranty and strict liability. Although the suit was filed

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[1]Section 95.031(2) provides: (2) Actions for products liability and fraud under § 95.11(3) must be begun within the period described in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in § 95.11(3), *but in any event within 12 years after the date of delivery of the completed product to its original purchaser* or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered. (e.s.)

within the four-year limitations period provided for in Section 95.11(3)(e), Florida Statutes, it was not filed within twelve years from the November 11, 1966, delivery of the subject pressbrake to the original purchaser as required by the statute of repose. Therefore, the trial court entered summary judgment against Pullum.

[1] Application of the statute of repose to Pullum reduced the time within which he was required to file suit after his accident from four years to a little over one and one-half years. This does not amount to a proscribed limitation of access to courts under Article I, Section 21, of the Florida Constitution. See *Cates v. Graham*, 451 So.2d 475 (Fla. 1984); *Purk v. Federal Press Company*, 387 So.2d 354 (Fla.1980); *Bauld v. J.A.Jones Construction Company*, 357 So.2d 401 (Fla.1978). Pullum concedes that point but urges that the application of the subject statute denies equal protection of the law. He points out that if the accident had occurred twelve years or more after delivery of the machine, the statute of repose would not have barred his action, and he would have had, pursuant to Section 95.11(3), four years from the accident date within which to file his suit. This is so because of the Supreme Court's holding in *Overland Construction Company, Inc. v. Sirmons*, 369 So.2d 572 (Fla.1979), in which the court held that the barring of a cause of action under a similar statute of repose[2] before

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[2]Although the statute of repose involved in *Overland*, Section 95.11(3)(c), deals with liability for improvements to real property, the *Overland* holding applies equally to product liability statutes of repose such as Section 95.031(2). See *Battilla v. Allis Chalmers Manufacturing Company*, 392 So.2d 874 (Fla.1981); *cf. Purk v. Federal Press Company, supra.*

the cause of action accrued is repugnant to the Article I, Section 21, guarantee of the right of access to courts.[3] The results of the interplay among the regular four-year limitations statute, the twelve-year statute of repose and the holding in *Overland* are: (1) that a person who sustains an injury at any time within eight years from the product's initial delivery date will have four years from the date of injury within which to file suit; (2) that a person injured twelve years or more after the delivery date will also have four years from the date of injury to sue because *Overland* would preclude the operation of the twelve-year statute; provided, however, that such person might not have as many as four years to bring the action where his injury occurred prior to January 1, 1975, the effective date of Chapter 74-382, Laws of Florida (the law creating Section 95.031), and where he would be required to file suit by January 1, 1976, by virtue of the one-year savings clause provided for by Chapter 74-382, section 36; and (3) that those persons injured during the time frame of eight to twelve years after delivery date will be governed by a limitations period of something less than four years, such period depending upon the point, during that time frame, when the injury occurs (i.e., if the injury occurs nine years after delivery, the party would have three years to sue; if the date of injury was

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[3]In *Overland, supra,* the Court distinguished *Bauld, supra,* pointing out that, in *Bauld:* (1) the injury occurred prior to the enactment of the applicable statute of repose; (2) two and one-half years of the four year limitations period had elapsed when the statute was enacted; and (3) a savings clause extended the deadline an additional year for filing suit on existing causes of action which otherwise would have been terminated by the new twelve-year limitation.

10 years after delivery, suit would have to be brought within two years; etc.). Pullum complains that he is denied equal protection because he had only one and a half years from his injury within which to file suit whereas a person injured by the same machine approximately two and one-half years later (at least 12 years after delivery) would have, by virtue of the holding in *Overland,* four years within which to file.

The Supreme Court of Florida has consistently sustained such statutes of repose against constitutional attack where application of the statute leaves the plaintiff with sufficient time to institute suit after injury or discovery of the cause of action. See *Cates v. Graham, supra; Purk v. Federal Press Co., supra; Bauld v. J. A. Jones Construction Company, supra; Universal Engineering Corp. v. Perez,* 451 So.2d 463 (Fla.1982); *compare Overland Construction Company, Inc. v. Sirmons, supra; Diamond v. Squibb and Sons,* 397 So.2d 671 (Fla.1981); and *Battilla v. Allis Chalmers Manufacturing Company, supra.* Admittedly, most of these authorities have dealt with attacks under the Article I, Section 21, "access to courts" provision.[4] However, in *Purk,* the Plaintiff also contended that the statute denied her equal protection of the laws. which contention was rejected by the Supreme Court. Mrs. Purk was injured on April 24, 1973, by a punch press machine which had originally been delivered on June 2, 1961. The applicable limitation statute would have given

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[4]For example, the Court stated in *Overland, supra:* "[T]he unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this 'statute of repose' may be valid under state or federal due process or equal protection clauses."

her four years from the injury date within which to file suit. However, the statute of repose, enacted effective January 1, 1975, barred actions for injuries occurring twelve years or more after the delivery date. But the statute's savings clause afforded one year to all existing causes of action (i.e., until January 1, 1976) within which to file suit. Mrs. Purk's four-year period for filing suit was therefore reduced to approximately two years and eight months (the period of time between the April 24, 1973, date of accident and the savings clause date, January 1, 1976). In contrast, a person injured by the same machine almost one year and four months earlier than the date of Mrs. Purk's injury would have had four years within which to file suit. Moreover, and perhaps more significantly, the Supreme Court in *Purk* recognized that the statute of repose with which it was dealing was subject to its decision a year earlier in *Overland, supra,* which materially affected the application of the statute by, as we have noted, holding that persons injured after the running of the twelve-year statute of repose would have four full years from the date of injury within which to file suit. The *Purk* court, nevertheless, held that the statute did not deny equal protection of the laws.

[2] The fact that Mrs. Purk's injury occurred prior to the enactment of Section 95.031 and thus was covered by the one-year savings clause of Chapter 74-382, Section 36,[5] whereas Pullum's injury occurred after the effective date of the act, does not furnish Pullum with any equal protection argument materially different from that

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[5]This savings clause was codified as Section 95.022, Florida Statutes (1975).

of Mrs. Purk. The statute of repose operated on both to reduce their otherwise available four-year limitation periods to lesser periods whereas those persons injured by products delivered twelve years or more before the injury continue to have four years within which to file suit. The Supreme Court having denied in *Purk* the equal protection attack on the subject statute, we likewise reject such attack in the instant case.

Essentially, persons such as Mr. Pullum who claim to have been caught in the legislatively imposed statute of repost time squeeze are left only with a denial of access to the courts argument where the injury occurs too close in time to the end of the twelve-year period. As previously noted, this argument is unavailing to Pullum inasmuch as one and one-half years still remained after the accident before the twelve-year period expired. In *Cates v. Graham, supra,* which involved application of another statute of repose dealing with medical malpractice,[6] the Supreme Court held that a five-to-six-month time squeeze imposed by the statute upon the plaintiff did not constitute an unconstitutional denial of access to the courts. See also *Cobb v. Maldonaldo,* 451 So.2d 482 (Fla. 4th DCA 1984) (on motion for rehearing).

The summary judgment is Affirmed.

MILLS and SMITH, JJ., concur.

On Motion for Rehearing

PER CURIAM.

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[6]Section 95.11(4)(b), Florida Statutes.

Although we deny the appellant's motion for rehearing, we certify the following, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v), as a question of great public importance:

> Does Section 95.031(2), Florida Statutes, deny equal protection of the laws to persons such as appellant who are injured by products delivered to the original purchaser between eight and twelve years prior to the injury?

MILLS, SMITH and NIMMONS, JJ., concur.

IN THE CIRCUIT COURT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO. 80-14330-CA

DIVISION: O

RICHARD A. PULLUM,

Plaintiff,

vs.

CINCINNATI, INCORPORATED,
et al

Defendants.

SUMMARY FINAL JUDGMENT

This cause came on for further hearing and Defendant moved (ore tenus) for the entry of Summary Judgment on the ground that the action was barred by that Statute of Limitations, Chapter 95.031(2), Florida Statutes.

The Court having ruled that the action is barred by the Statute of Limitations, and Plaintiff having waived the requirements of twenty days notice (Rule 1.510, Rules of Civil Procedure) and there being no genuine issue as to material fact with regard to the Statute of Limitations, it is

ORDERED AND ADJUDGED:

1. The Motion is granted.

2. Plaintiff shall take nothing by this action, and Defendants shall go hence without day and recover from Plaintiff their costs to be taxed on Motion and Notice.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 29th day of June, 1983.

s/ John M. McNatt

CIRCUIT JUDGE

IN THE CIRCUIT COURT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO. 80-14330-CA

DIVISION: O

RICHARD A. PULLUM,

Plaintiff,

vs.

CINCINNATI, INCORPORATED,
et al

Defendants.

ORDER RE: STATUTE OF LIMITATIONS

At their special request the parties have been heard upon the question of whether this action is barred by the statute of limitations, namely Chapter 95.031(2), Florida Statutes.

The parties stipulated before the Court.

(a) The machine, a Press Brake, was delivered to the original purchasers on November 11, 1966.

(b) The Plaintiff was injured while operating the machine on April 29, 1977.

(c) This action was filed November 25, 1980.

The cited statute requires that such an action be filed "within 12 years after the date of delivery," whereas this action was filed fourteen years and fourteen days after the date of delivery; and three years, six months and twelve days after the injury.

The Plaintiff had one year six months and twelve days to file his action before the statute ran, but did not do so.

Plaintiff asserts that the statute is unconstitutional because it denies Plaintiff equal protection of the laws under the Constitution of the United States and of the State of Florida. However, the Supreme Court of Florida has held the statute to be Constitutional. *Purk v. Federal Press Company* (Fla) 387 So(2d) 354.

This action falls squarely within the *Purk* decision, and the Court is compelled to rule that the action is barred by said statute of limitations.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 27th day of June, 1983.

s/ John M. McNatt
CIRCUIT JUDGE

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

No. 66,198

RICHARD PULLUM, Appellant

vs.

CINCINNATI, INC., THE CINCINNATI SHAPER COMPANY, STI-GRO CORP., f/k/a Harry P. Leu Machinery Corp. dissolved Florida corporation, ROBERT E. STINE, EUGENE E. STINE and ROBERT E. GROTH, as directors and/or trustees of Sti-Gro First Corp., Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Richard Pullum, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida entered in this action on November 4, 1985, by denial of rehearing. The judgment approved "the result only," but not the rationale, of the district court of appeal's decision affirming the summary judgment entered by the trial court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 30th day of December, 1985 to Ellis E. Neder, Jr., Esquire, 1001 Blackstone Building, Jacksonville, Florida 32202, Attorney for Appellees, Cathy J. Burris, Esquire, P.O. Box 030067, Ft. Lauderdale, Florida 33303 and W. C. Gentry, Esquire, 101

East Adams Street, Jacksonville, Florida, Attorneys for Amicus Cuuriae, Academy Florida Trial Lawyers.

BROWN, TERRELL, HOGAN & ELLIS, P.A.

/s/ Wayne Hogan
804 Blackstone Building
Jacksonville, Florida 32202
904/632-2424

Attorneys for Appellant

OVERLAND CONSTRUCTION COMPANY, INC., Petitioner,

v.

Jerry L. SIRMONS, et ux., et al.,

Respondents (Two cases).

Nos. 52799, 52788.

Supreme Court of Florida.

March 1, 1979.

Action was brought against building owner and building contractor to recover for injuries which plaintiff sustained in the building while in the course of his employment. Contractor moved for summary judgment based on the statutory 12-year ban on lawsuits arising out of improvements to realty. The Circuit Court, Palm Beach County, Vaughn J. Rudnick, J., declared the limitation period unconstitutional. Review was sought by way of certiorari and appeal. The Supreme Court, England, C. J., held that statute providing that an action founded on the design, planning or construction of an improvement to realty must be brought against the professional engineer, registered architect or licensed contractor within 12 years

after completion of the improvement violates constitutional right of access to courts insofar is it provides an absolute bar to lawsuits brought more than 12 years after events connected with construction of the improvements.

Affirmed.

Alderman, J., dissented and filed opinion in which Boyd and Overton, JJ. concurred.

Constitutional Law 328

Limitation of Actions 4(2)

Statute providing that an action founded on the design, planning or construction of an improvement to realty must be brought against the professional engineer, registered architect or licensed contractor within 12 years after construction of the improvement violates constitutional right of access to the courts insofar as it is an absolute bar to lawsuits brought more than 12 years after events connected with construction of the improvement; fact that passage of time aggravates difficulty of producing reliable evidence and that advances in technology tend to push industry standards higher do not justify such limitation. West's F.S.A. § 95.11(3)(c); West's F.S.A.Const. art. 1, § 21.

Justice W. Reid of Magill, Sevier & Reid, Palm Beach, and Edna L. Caruso, West Palm Beach, for petitioner-appellant.

Richard L. Martens of Cone, Owen, Wagner, Nugent, Johnson & McKeown, and Larry Klein, West Palm Beach, for respondents-appellees.

ENGLAND, Chief Justice.

In this proceeding we are called upon to review the constitutionality of section 95.11(3)(c), Florida Statutes (1975), insofar as it absolutely bars the right to bring suit for certain injuries incurred on real property unless the lawsuit is commenced within twelve years after the completion of the improvements which produced the injury. The relevant portion of the statute, which limits actions "founded on the design, planning, or construction of an improvement to real property," states:

> In any event the action must be commenced within 12 years after the date of actual possession by the owner, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer.

In 1961, Overland and another company completed construction of a building in West Palm Beach. In 1975, more than twelve years after Overland's completion of construction, Jerry Sirmons was injured in the building in the course of his employment. He sued both the owner of the building and its builders. When Overland moved for a summary judgment based on the statutory twelve year ban on lawsuits, the quoted portion of section 95.11 (3)(c) was declared unconstitutional by the trial court, thereby allowing Sirmons and the other respondents to proceed with the lawsuit notwithstanding the seeming bar of the statute. Overland has now sought to have the ruling reversed here, pursuant to article V, section 3(b)(3), Florida Construction, and *Burnsed v. Seaboard Coastline Railroad Co.*, 200 So.2d 13 (Fla.1974.)

The trial court held the statute unconstitutional as violative of article I, section 21 of the Florida Constitution,[1] which provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

This constitutional mandate which has appeared in every revision of the state constitution since 1838,[2] has no counterpart in the federal constitution and derives its scope and meaning solely from Florida case law.[3] The polestar decision for the construction of this provision is *Kluger v. White*, 281 So.2d 1, 4 (Fla.1973), in which we held:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an over-

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[1]The trial court also invalidated the statute on other constitutional grounds, but our disposition of this case makes it unnecessary to address those issues.

[2]*G. B. B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899, 901 (Fla. 3d DCA 1977).

[3]See, for example, *Carter v. Sparkman*, 335 So.2d 802 (Fla. 1976), *cert. denied*, 249 U.S. 1041, 97 S.Ct. 740, 50 L.Ed.2d 753 (1977); *Sunspan Eng'r & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So.2d 4 (Fla.1975); *Scholastic Systems, Inc. v. LeLoup*, 307 So.2d 166 (Fla.1974); *Kluger v. White*, 281 So.2d 1 (Fla.1973); *Flood v. State ex rel. Homeland Co.*, 95 Fla. 1003, 117 So. 385 (1928).

> powering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Based on *Kluger*, then, we must first decide whether the legislature, without providing any reasonable alternative, has abolished a statutory or common law right of action protected by article I, section 21,[4] and if so, whether that action is grounded both on an overpowering public necessity and an absence of any less onerous alternative means of meeting that need.

It is undisputed that a cause of action of the type asserted by Sirmons in this case—the right of an injured person to bring suit against a building contractor with whom he is not in privity for damages suffered as a result of alleged negligence in construction even after the owner has accepted the completed building—is one for which a right of redress is guaranteed by article I, section 21. This common law right, though not expressly recognized by statute until 1975,[5] was acknowledged as extant by this Court in 1959.[6] When the "access to courts" provision

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[4]§ 2.01, Fla.Stat. (1975), provided that "[t]he common and statute laws of England which are of a general and not a local nature . . . to be of force in this state . . ." The common law principles as adopted by section 2.01, however, have not been *confined as of 1776, but have been held to be "designed for* application to new conditions and circumstances." *State ex re. Burr v. Jacksonville Terminal Co.*, 90 Fla. 721, 744, 106 So. 576, 584 (1925).

[5]Ch. 74—382, § 7, laws of Fla., codified as § 95.11(3)(c), Fla. Stat. (Supp.1974) (effective January 1, 1975).

[6]*Slavin v. Kay*, 108 So.2d 462, 465-67 (Fla.1959). While the common law rule in effect in 1776 had severely limited a contractor's liability, a more expansive view was developed by our courts over the years as exceptions to the general rule. For a discussion of the evolution of contractor liability in Florida, *see Slavin*, and *see generally*, W. Prosser, Torts § 104, at 680-82 (4th ed. 1971).

of the constitution was readopted in 1968, there existed a right of redress against contractors for the type of injury Sirmons suffered, provided, of course, that suit was commenced within fours years[7] after the cause of action accrued by the occurrence of the injury.

Section 95.11(3)(c), insofar as is relevant to this proceeding, creates absolute immunity from suit for certain professionals and contractors connected with the construction of improvements to real property after the expiration of twelve years from the completion of the building. It unquestionably abolished Jerry Sirmons' right to sue Overland for his injuries and provided no alternative form of redress. The only remaining issue under *Kluger*, therefore, is whether the legislature has shown an overpowering public necessity for this prohibitory provision, and an absence of less onerous alternatives.

The legislature itself has not expressed any perceived public necessity for abolishing a cause of action for injuries occurring more than twelve years after the completion of improvements to real property. Overland suggests that several other states have adopted analogous limitations,[8] principally to counter a trend in the decisional law toward expanded liability for professional engineers, architects and contractors, and that the need for this type of statute is predicated on the difficulty of proof which naturally accompanies the passage of time.

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[7]§ 95.11(4), Fla.Stat. (1967).

[8]See, for example, *Carter v. Hartenstein*, 248 Ark. 1171, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901, 91 S.Ct. 868, 27 L.Ed.2d 800 (1971); *Joseph v. Burns*, 260 Or. 493, 491 P.2d 203 (1971).

We recognize the problems which inhere in exposing builders and related professionals to potential liability for an indefinite period of time after an improvement to real property has been completed. Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event, these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action. The legislation impermissibly benefits only one class of defendants, at the expense of an injured party's right to sue, and in violation of our constitutional guarantee of access to courts.

This analysis of section 95.11(3)(c) naturally calls for an explanation of our recent decision in *Bauld v. J. A. Jones Construction Co.*, 357 So.2d 401 (Fla.1978), where we sustained this very provision in the face of a constitutional challenge by one whose cause of action was curtailed, rather than wholly barred, by the effect of section 95.11(3)(c). In *Bauld*, unlike the present case, the injury occurred prior to the enactment of section 95.11(3)(c), at a time when the applicable statute of limitations provided only that suit must be commenced within four years.[9]

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[9] § 95.11(4), Fla.Stat. (1971).

When section 95.11(3)(c) took effect in 1975, two and one-half years of that period had elapsed, during which time an action could have been filed. Moreover, the savings clause of section [c]5.022[10] extended the deadline for instituting existing causes of action which would otherwise have been terminated by the new twelve year limitation for an additional year. Consequently, the absolute twelve year prohibitory provision did not operate to abolish Pearl Bauld's cause of action, but merely abbreviated the period within which suit could be commenced from four to three and one-half years. Although shortened, the time for bringing suit was found to be ample and reasonable; it was not forestalled altogether.

By contrast, Sirmons' cause of action was already barred by the twelve year limitation when it first accrued —that is, when his injuries occurred. No judicial forum would ever have been available to Sirmons if the twelve year prohibitory portion of the statute were given effect. Obviously, our decision as to the validity of the statute vis-a-vis Pearl Bauld would not operate to bar our declaring the same statute invalid vis-a-vis Jerry Sirmons.

Some mention should be made of decisions from other jurisdictions concerning similar statutes. In several cases relied on by Overland the courts reviewed statutory provisions similar to section 95.11(3)(c) under a much less exacting standard than our own constitution and decisional

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[10]Under section 95.022, any action barred by the new statute that would not have been barred under prior law could still be commenced at any time before January 1, 1976. Of course, this provision is of no benefit to Sirmons, or others similarly situated, whose right of action had not arisen prior to January 1, 1975.

law require. The courts in those states essentially determined that their laws constituted a reasonable exercise of the police power, unrelated to any "access to courts" provision in their organic law or a subservient *Kluger* standard.[11]

A foreign decision which we do find persuasive, however, is *Saylor v. Hall*, 497 S.W.2d 218 (Ky.1973), in which a like statute was tested against a constitutional provision guaranteeing a right of access to courts similar to our own.[12] The Kentucky court recognized that a majority of other jurisdictions considering the issue had upheld the validity of such statutes against due process and equal protection attacks, but it nonetheless held that

> the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action.[13]

We similarly conclude that in Florida, as in Kentucky, the unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this "statute of repose" may be valid under state or federal due process or equal protection clauses.

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[11]Several state statutes are identified in Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 Catholic U.L.Rev. 361 (1969).

[12]Section 14 of the Constitution of Kentucky provides:

All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

[13]497 S.W.2d at 225.

We hold that, insofar as section 95.11(3)(c), Florida Statutes (1975), provides an absolute bar to lawsuits brought more than twelve years after events connected with the construction of improvements to real property, it violates article I, section 21 of the Florida Constitution. The order of the trial court is, therefore, affirmed.

It is so ordered.

ADKINS, SUNDBERG and HATCHETT, JJ., concur.

ALDERMAN, J., dissents with an opinion, with which BOYD and OVERTON, JJ., concur.

ALDERMAN, J., dissenting.

Section 95.11(3)(c), Florida Statutes (1975), prevents a cause of action founded on the design, planning, or construction of an improvement to real property from arising against professional engineers, registered architects, and licensed contractors after twelve years from the date of actual possession by the owner, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer. The majority, relying on *Kluger v. White*, 281 So.2d 1 (Fla.1973), holds this section to be in violation of article I, section 21, of the Florida Constitution, because the legislature failed to show an overpowering public necessity or that there was no less onerous alternative method.

Although the legislature, in section 95.11(3)(c) did not make an express finding that this statute was enacted to meet an overpowering public necessity and that there is no less onerous alternative, it is apparent to me that

the limitation on causes of actions imposed by this section was created to meet such a necessity. Some insight into the purpose of section 95.11(3)(c) may be found in *Grissom v. North American Aviation, Inc.*, 326 F.Supp. 465 (M.D.Fla.1971). In that case, the court was considering section 95.11(10), Florida Statutes (1969), the predecessor to section 95.11(3)(c), which provided a time limitation of twelve years within which actions may be brought against professional engineers and registered architects. The widow of astronaut Virgil Grissom sued for the wrongful death of her husband, who had been killed while engaged in a "ground test" of an apollo space capsule. One of the issues before the court was the intent of the legislature in passing the twelve-year limitation. In the absence of any legislative history, the court looked to a somewhat similar statutory proposal that had been before the United States House of Representative—H.R. Bill No. 4181. The court considered House Report No. 91—370, which accompanied H.R. Bill 4181. The report explained the basis for limiting to some definite period the time in which an action could be brought against the engineers, architects, or designers of improvements to realty. The reasons set out in the report are equally applicable to Florida and make clear the overpowering public necessity for section 95.11(3)(c). The report in part said:

> ". . . Architects who design buildings or improvements to real property, engineers who design and install equipment, or contractors, who build the improvements under rigid inspection and conformity with building codes, may find themselves named as defendants in such damage suits many years after the improvement was completed and occupied.

Comparatively, modern architecture, engineering, and construction, with the new techniques, technology, and methods, may give the appearance of defective or unsafe conditions to older structures which conditions may be used as a basis for such damage suits. In such cases, the architectural plans used may have been discarded, copies of building codes in force at the time of design or construction may no longer be in existence and the persons who were individually involved may have deceased or may not be located. The purpose of the law is to provide a reasonable time and opportunity for a person who has suffered injury or damages to bring an action. To permit the bringing of such actions without any limitation as to time places the defendant in an unreasonable position if not imposing the impossibility of asserting a reasonable defense.

At hearings before your Committee, specific cases were mentioned to illustrate the need for the pending legislation. In one case an architectural firm designed an auditorium which was built in 1928. In 1965, a visitor to the auditorium fell on the stairway and was injured. Her allegation in a suit for damages against the owner was that her injury was due to the improper location of a handrail. The owner of the building, in turn, filed suit against the architect for alleged negligence in designing the stairway and handrail. Thus, 38 years after the completion of the construction the architectural firm is now defending itself against a $50,000 lawsuit.

In another instance an engineering firm designed a grain elevator which was built in 1934. The elevator

was destroyed by an explosion in 1957. In 1959, the owner sued the engineer for $250,000 alleging that the explosion was due to errors in the design of the ventilation system.

In the first case, none of the architects involved in the design of the auditorium is alive today but the architectural firm is being sued. The plans, specifications, and contracts may have been lost or destroyed. Old building codes, essential to the defense cannot be found. In the grain elevator case, the plaintiff in effect alleged that the engineer should have created in 1934 a ventilation system based on 1959 standards and technology.

Architects, engineers, and contractors have no control over an owner whose neglect in maintaining an improvement may cause dangerous or unsafe conditions to develop over a period of years. They cannot prevent an owner from using an improvement for purposes for which it was not designed. Nor can they prevent the owner of a building from making alterations or changes which may, years afterward, be determined unsafe or defective and appear to be a part of the original improvement."

326 F.Supp. at 467—8. The federal district court determined that this some general intent was a major reason for passage of section 95.11(10) and similar statutes in other jurisdictions.

If the legislature, in enacting section 95.11(3)(c), had made findings similar to those quoted above, there could be little doubt that it would have shown an overpowering public necessity and the absence of a less onerous alterna-

tive. Even without such express recital, however, I believe the need for section 95.11(3)(c) is clear. In the present case, the time lapse was sixteen years, but it could just have well been thirty-two or sixty-four years. Without section 95.11(3)(c), there is no limitation on the number of years after which a suit could be brought against an engineer, architect, or contractor.

The legislature has balanced the conflicting interests and determined that twelve years is a reasonable time after which a cause of action may not arise. In doing so, it has not, in my opinion violated article I, section 21 of the Florida Constitution. I would reverse the trial court's order.

BOYD and OVERTON, J.J., concur.

Dante A. BATTILLA and Gail A. Battilla, his wife, Appellants,

v.

ALLIS CHALMERS MANUFACTURING COMPANY and Travelers Insurance Company, Appellees.

No. 55908.

Supreme Court of Florida.

Dec. 11, 1980.

Rehearing Denied Feb. 12, 1981.

Product liability action was brought against manufacturer. The Circuit Court, Broward County, Lamar Warren J., held action barred by statute of limitations, and plaintiffs appealed. The Supreme Court held that statute as applied unconstitutionally denied plaintiffs access to the courts.

Reversed.

McDonald, J., dissented and filed opinion, in which Overton and Alderman, JJ., concurred.

Constitutional Law 328

Limitation of Actions 4(2)

Statute barring plaintiff's suit against manufacturer brought more than 12 years after date of sale as applied, unconstitutionally denied plaintiffs access to court under Florida Constitution. West's F.S.A.Const. Art. I, § 1 West's F.S.A. § 95.031.

Walter G. Campbell, Jr. of Krupnick & Campbell, and Nancy Little Hoffmann, Fort Lauderdale, for appellants.

Steven R. Berger of Carey, Dwyer, Cole, Selwood & Bernard, Miami, for appellees.

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County. The judgment passed upon validity of a state law. The notice of appeal was filed January 12, 1979. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. (1972).

The circuit court held that this product liability action was barred by the statute of limitations, section 95.031, Florida Statutes (1975). We reverse on the authority of *Overland Construction Co. v. Sirmons,* 369 So.2d 572 (Fla. 1979), and hold that, as applied to this case, section 95.031 denies access to courts under article I, section 21, Florida Constitution. *See also Purk v. Federal Press Co.,* 387 So.2d 354 (Fla.1980); *Bauld v. J. A. Jones Construction Co.,* 357 So.2d 401 (Fla.1978).

It is so ordered.

SUNDBERG, C.J., and ADKINS, BOYD and ENGLAND, J.J., concur.

McDONALD, J., dissents with an opinion, with which OVERTON and ALDERMAN, JJ., concur.

McDONALD, Justice, dissenting.

I disagree that there is anything unconstitutional about section 95.031(2). Although I recognize that the language in *Overland*[1] is such that it could be authority to extend its application to this section. I would limit that holding to section 95.11(3)(c). I do this not for any reason expressed or exceptions made in *Overland* but because a twelve-year limitation may be reasonable for liability for manufactured products and not for liability for improvements to real property.

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[1]*Overland Construction Co., Inc. v. Sirmons,* 369 So.2d 572 (Fla.1979).

Until the decision of *Matthews v. Lawnlite Co.*, 88 So.2d 299 (Fla.1956), Florida recognized the early common law rule which inhibited recovery where there was not privity of contract. Since then the law of products liability has evolved to the point that we now recognize liability of a manufacturer which sells a product in a defective condition unreasonably dangerous to the user or consumer.[2]

This developing liability of a manufacturer creates a policy dispute. It could be logically argued that once a product is manufactured and sold a manufacturer should be subject to liability for an injury whenever caused by that product. It could also be argued that such liability would place an onerous burden on industry and that, therefore, liability should be restricted to a time commensurate with the normal useful life of manufactured products.

The legislature, in enacting section 95.031(2), has determined that perpetual liability places an undue burden on manufacturers. It has determined that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturers of products. I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers. Because the normal useful life of buildings is obviously greater than most manufactured products there is a distinction in the categories of liability exposure between those sought to be limited by section 95.11(3)(c), struck down in *Overland*, and those listed in section 95.031(2).

I would sustain the trial judge's actions in upholding section 95.031(2), Florida Statutes, which statute restricts actions against a manuafcturer to twelve years from the date of the sale of the product.

OVERTON and ALDERMAN, JJ., concur.

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[2]*West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla.1976).

DISTRICT COURT OF APPEAL
FIRST DISTRICT

Tallahassee, Florida 32301
Telephone No. (904) 488-6152

January 13, 1986

Case No. BK-198

EFFIE DELL CASSIDY, et al

Appellant/Petitioner

vs.

THE FIRESTONE TIRE AND RUBBER COMPANY, et al.

Appellee/ Respondent

ORDER

Pursuant to Fla.R.App.P. 9.125, this court certifies the following question as one requiring immediate resolution by the Supreme Court because it is of great public importance and will have a great effect on the proper administration of justice throughout the state:

WHETHER THE RULE ANNOUNCED IN *PULLUM v. CINCINNATI, INC.*, 476 So.2d 657 (FLA. 1985) IS APPLICABLE TO CASES FILED PRIOR TO PUBLICATION OF THAT OPINION.

SUPREME COURT OF FLORIDA

TUESDAY, JANUARY 21, 1986

EFFIE DELL CASSIDY, et al.,

Petitioners,

v.

FIRESTONE TIRE AND RUBBER COMPANY, et al.,

Respondents.

CASE NO. 68,160
District Court of Appeal
1st District—BK-198

The District Court of Appeal, First District, pursuant to article V, section 3c(5), Florida Constitution, has certified a final judgment of the circuit court in and for Escambia County, Florida, as one requiring immediate resolution by this Court because it is of great public importance and will have a great effect on the proper administration of justice throughout the state.

The district court of appeal's request to invoke our discretionary jurisdiction is denied.

ADKINS, Acting C.J., OVERTON, McDONALD and SHAW, JJ., concur
EHRLICH and BARKETT, JJ., dissent

Wilma PURK and Donald Purk,

Appellants.

v.

FEDERAL PRESS COMPANY and
Florida Machinery Corporation,

Appellees.

No. 55214.

Supreme Court of Florida.

July 24, 1980.

Plaintiff in products liability action appealed from summary judgment entered in the Circuit Court in and for Broward County, John A. Miller, J., for defendants on the ground that the statute of limitations barred the action. The Supreme Court, Boyd, J., held that: (1) the statute of limitations, which provided that an action for products liability must be begun within 12 years after date of delivery of the completed product to its original purchaser regardless of the date the defect in the product was or should have been discovered, did not unconstitutionally deny access to the courts, in that the injury occurred prior to enactment of the statute, and while the time for bringing suit was shortened, the cause of action was not abolished, and (2) the statute rationally treated differently persons in different circumstances, and did not deny equal protection.

Affirmed.

1. *Constitutional Law 328*

Limitation of Actions 4(2)

Statute which provides that an action for products liability must be begun with 12 years after date of deliv-

ery of completed product to its original purchaser regardless of date defect in product was or should have been discovered did not unconstitutionally deny plaintiff access to the courts for her products liability claim, in that injury occurred prior to enactment of statute, and while time for bringing suit was shortened, the cause of action was not abolished. West's F.S.A. § 95.031(2); West's F.S.A. Const. Art. I, § 21.

2. *Constitutional Law 308*

Products Liability 2

Statute of limitations for products liability actions, which provides that an action for products liability had to be brought within 12 years after date of delivery of the completed product to its original purchaser regardless of date defect in product was or should have been discovered, rationally treated differently persons in different circumstances, and thus statute did not deny equal protection. West's F.S.A. § 95.031(2); U.S.C.A.Const. Amends. 5, 14.

3. *Statutes 109.1*

State constitutional article which requires that laws embrace but one subject and matter properly connected therewith, and that the subject be briefly expressed in the title, does not require that title contain a detailed explanation of every provision, but only that all matters dealt with in body of the law be fairly related to subject described in the title; title is adequate if it is not misleading and is sufficiently detailed to put interested persons on notice reasonably relating to inquiry as to contents of the act. West's F.S.A.Const. Art. 3, § 6.

4. *Statutes 117(4)*

Title of legislative act relating to limitation of actions was sufficient to put interested persons on notice reasonably leading to inquiry as to contents of the act, and did not violate state constitutional article which requires that laws embrace but one subject and matter properly connected therewith, and that subject be briefly expressed in the title. West's F.S.A.Const. Art 3, § 6.

Law Offices of Cone, Owen, Wagner, Nugent, Johnson & McKeown and Larry Klein, West Palm Beach, for appellants.

Michael D. Stewart of Fleming, O'Bryan and Fleming, Fort Lauderdale, for Federal Press Co.

Joseph S. Kashi of Grimmett, Scherer & James, Fort Lauderdale, for Florida Machinery Corp.

BOYD, Justice.

This is an appeal from a final judgment of the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County in which that court passed upon the constitutionality of section 95.031(2), Florida Statutes (1975). We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.

The trial court found that Federal Press Company manufactured and Florida Machinery Corporation sold and delivered a punch press machine to the plaintiff's employer, with delivery occurring no later than June 2, 1961. Wilma Purk was injured using the machine on April 24, 1973. On April 13, 1976, Mrs. Purk brought this action al-

leging that the defectiveness and negligent manufacture of the machine caused her injury. The trial court entered summary judgment for the defendants on the ground that the statute of limitations bars the action.

On January 1, 1975, chapter 74-382, Laws of Florida, went into effect. This law was a general revision of the statute of limitations. Section 3 provides that an action for products liability must be begun within twelve years after the date of delivery of the completed product to its original purchaser regardless of the date the defect in the product was or should have been discovered.[1] Section 7

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1. Section 3 of chapter 74-382 created section 95.031, Florida Statutes (1975), the section at issue in the instant case, which after an amendment not directly pertinent, chapter 75-234, Laws of Florida, provided as follows:

> 95.031 Computation of time.—Except as provided in subsection 95.051(2) and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.
>
> (1) A cause of action accrues when the last element constituting the cause of action occurs. For the purposes of this chapter, the last element constituting a cause of action on an obligation or liability founded on a [written instrument] payable on demand or after date with no specific maturity date specified in the [instrument], and the last element constituting a cause of action against any endorser, guarantor, or other person secondarily liable on any such obligation or liability founded on [a written instrument payable on demand or after date], is the first written demand for payment, notwithstanding that the endorser, guarantor, or other person secondarily liable has executed a separate writing evidencing such liability.
>
> (2) Actions for products liability and fraud under subsection 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or

(Continued on following page)

provides that an action based on the design, planning or construction of an improvement to real property must be begun with four years of the accrual of the cause of action, "but in any event within twelve (12) years after the date of actual possession by the owner or the date of abandonment of construction if not completed, or upon completion or termination of the contract between the professionel engineer, registered architect or licensed contractor and his employer."[2]

(Continued from previous page)

should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection 95.11(3) but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

2. Section 7 amended the statute so that section 95.11, Florida Statutes (1975), provides in part as follows:

95.11 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(3) WITHIN FOUR YEARS—

(a) An action founded on negligence.

(b) An action relating to the determination of paternity.

(c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of abandonment of construction if not completed, or [the date of] completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer; except that when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event [the action must be commenced] within 12 years after the date of actual possession by the owner, the date of abandonment of construction if not completed, or [the date of] completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer.

Section 36 of the law provides a savings clause by virtue of which an action that would have been barred by the new statute on its effective date was allowed until January 1, 1976 to be commenced.[3] Since the appellants did not bring their action until April 13, 1976, the complaint was not timely.

[1] The appellants contend that section 95.031(2) denies access to court's in violation of article I, section 21, Florida Constitution. In support of this proposition they cite *Kluger v. White*, 281 So.2d 1 (Fla.1973), where we held

> that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. §2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the right of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. at 4.

In *Bauld v. J.A. Jones Construction Co.*, 357 So.2d 401 (Fla. 1978), we were faced with the question of the validity of section 95.11(3)(c), Florida Statutes (1975) . We held that the twelve-year limitation of actions founded on the

---

3. Section 36 is section 95.022, Florida Statutes (1975):

> 95.022 Effective date; saving clause.—This act shall become effective on January 1, 1975, but any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if it is not commenced by that date, the action shall be barred.

design, planning, or construction of an improvement to real property, as applied in that case, did not deny access to courts by abolishing a cause of action in violation of article I, section 21, Florida Constitution. In the subsequent case of *Overland Construction Co. v. Sirmons*, 369 So.2d 572 (Fla.1979), we held that section 95.11(3)(c), insofar as it provided an absolute bar to lawsuits brought more than twelve years after events connected with the construction of improvements to real property, did violate article I, section 21.

The majority opinion in *Overland* explained why the two cases were treated differently.

> In *Bauld*, unlike the present case, the injury occurred prior to the enactment of section 95.11(3)(c), at a time when the applicable statute of limitations provided only that suit msut be commenced within four years. When section 95.11(3)(c) took effect in 1975, two and one-half years of that period had elapsed, during which time an action could have been filed. Moreover, the savings clause of section 95.022 extended the deadline for instituting existing causes of action which would otherwise have been terminated by the new twelve year limitation for an additional year. Consequently, the absolute twelve year prohibitory provision did not operate to abolish Pearl Bauld's cause of action, but merely abbreviated the period within which suit could be commenced from four to three and one-half years. Although shortened, the time for bringing suit was found to be ample and reasonable; it was not forestalled altogether.
>
> By contrast, Sirmons' cause of action was already barred by the twelve year limitation when it first accrued—that is, when his injuries occurred. No judicial forum would ever have been available to Sirmons if the twelve year prohibitory portion of the statute

> were given effect. Obviously, our decision as to the validity of the statute vis-a-vis Pearl Bauld would not operate to bar our declaring the same statute invalid vis-a-vis Jerry Sirmons.

369 So.2d at 574-75 (footnotes omitted).

The present case is like *Bauld* in that the injury occurred prior to the enactment of section 95.11(3)(c). The time for bringing suit was shortened, but the cause of action was not abolished. We hold that as applied here, section 95.11(3)(c) does not deny the right of access to courts.

[2] The appellants contend that the statute denies equal protection by establshing a classification which has no rational relation to a proper state objective. A statute of limitation does not deny equal protection if it is based on a rational distinction among classes of persons. *See, e. g., Gammon v. Cobb*, 335 So.2d 261 (Fla.1976). The above discussion of the distinction between *Bauld* and *Overland* demonstrates that the statute treats differently persons in different circumstances. We hold that it does not deny equal protection.

The appellants contend finally that the statute violates article III, section 6, Florida Constitution, which requires that laws embrace but one subject and matter properly connected therewith, and that the subject be briefly expressed in the title. As presented by the appellants, this contention is not even colorably meritorious since they call our attention not to the title of the law in question but to the title or subject heading of chapter 95, Florida Statutes (1975). The title to chapter 74-382, Laws of Florida, reads in relevant part:

> AN ACT relating to limitations of actions; creating sections . . .; prescribing the periods of time for limitations; the conditions under which the periods of time

apply, the times when actions accrue, the applicability of limitations and laches; repealing sections . . . .

[3, 4] Article III, section 6 does not require that the title contain a detailed explanation of every provision, but only that all matters dealt with in the body of the law be fairly related to the subject described in the title. *State v. McDonald,* 357 So.2d 405 (Fla. 1978); *Town of Monticello v. Finlayson,* 156 Fla. 568, 23 So.2d 843 (1946). The title is adequate if it is not misleading and is sufficiently detailed to put interested persons on notice reasonably leading to inquiry as to the contents of the act. *King Kole, Inc. v. Bryant,* 178 So.2d 2 (Fla.1965); *Wright v. Board of Public Instruction,* 48 So.2d 912 (1951). The title of chapter 74-382 is sufficient.

The judgment is affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

Supreme Court, U.S.
FILED
APR 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1392

In the

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD PULLUM, APPELLANT

v.

CINCINNATI, INC., ETC., ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL REPLY BRIEF

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April 2, 1986

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INTRODUCTION

The essence of this appeal: a substantial valid federal equal protection challenge stands rejected but unanswered. The challenge was presented (appellees admit this). The challenge was valid (no one suggests that discriminating against victims of 8 to 12 year-old defective products is more rational or serves a more legitimate state purpose than the invalid statute that discriminated based on when people moved to Alaska. *Zobel v. Williams,* 457 U.S. 55, 65, 102 S. Ct. 2309, 2315, 72 L.Ed.2d 672, 681 (1982). The challenge was rejected (the summary judgment was affirmed). The challenge remains unanswered (to quote appellees, page 11: "Nowhere in its opinion did the Florida Supreme Court address, expressly or by clear implication, the federal equal protection question.").

This appeal presents two basic, significant, propositions: ONE — those who make substantial federal equal protection challenges in American courts have a right to have those challenges evaluated and answered; and TWO — state courts may not evade substantial valid federal equal protection challenges by purporting to eliminate them retroactively. Appellees' ignore these undeniable principles; hence, this reply.

THE REPLY

The platitudes served up by appellees neither enlighten the debate, lessen the error, nor undercut the reasons why this Court should decide this case. Nevertheless, we deal with them, one-by-one, in order.

Pages 1 and 2. Appellees' claim: "Nowhere in its opinion did the Florida Supreme Court acknowledge a valid equal protection argument." Reply: Then why did the court reject the certifying court's opinion and explicitly say:

> *Since* we have receded from *Battilla,* it logically *follows* that section 95.031(2) does not deny equal protection.

> This is so because the classification *originally* established by the statute bears a rational relationship to a proper state objective. In receding from *Battilla, we* have eliminated the premise of Pullum's equal protection argument.

Pullum v. Cincinnati, Inc., 476 So.2d 657, 660 (Fla. 1985) (emphasis supplied). Plainly, the court understood that the summary judgment against Pullum resulted from the amended statute's irrational and purposeless discrimination.

Pages 2-5. The "Motion to Affirm". Appellees' claim (page 4): The statute *before* amendment by *Battilla* did not deny equal protection. Reply: This claim is irrelevant; Pullum challenged the *amended* statute's irrational, purposeless discrimination against victims of pre-teen defective products.

Appellees' claim (page 4): Appellant conceded that the statute did not deny him his right of access to the courts. Reply: This, too, is irrelevant; the amended statute *did* deny him equal protection and *that* was, has always been, and remains the point.

Pages 5 and 6. The "Motion to Dismiss — Lack of Jurisdiction". Appellees' claim: Pullum lacks "standing". Reply: This is the proverbial red herring. Richard Pullum's 14th Amendment right to equal protection has been brushed aside. He has standing — in this Court.

Pages 7-10. The "Motion to Dismiss — Independent and Adequate Non-Federal Grounds". Appellees' claim (page 7): The opinion "does not mention anything about the federal equal protection challenge asserted by the Appellant." Reply: Apparently appellees mean to suggest that, notwithstanding our reliance on *Zobel v. Williams,* on which the Florida Court had recently relied in *Ostendorf v. Turner,* 426 So.2d 539, 544-45 (Fla. 1982), the time-pressed court simply overlooked the 14th Amendment. Even if this were true, such an oversight by a state court would not defeat this Court's jurisdiction

to decide a federal constitutional challenge to a state statute. An erroneous failure to pass on such a federal challenge is treated as equivalent to a finding of validity within the meaning of 28 USC § 1257(2). This Court has declared that constitutional rights are denied

> by the refusal of the state court to decide the question, as by an erroneous decision of it, see *Green v. Louisville & Interurban R. Co.* 244 U.S. 499, 508, 512 et seq., 61 L. ed. 1280, 1285, 1287, 37 S. Ct. 673, Ann. Cas. 1917E, 88; *Smith v. Cahoon,* 283 U.S. 553, 564, 75 L. ed. 1264, 1272, 51 S. Ct. 582, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked.

Lawrence v. State Tax Commission, 286 U.S. 276, 282-83, 52 S. Ct. 556, 558, 76 L.Ed. 1102, 1107 (1932).

But, the Florida court did not overlook the federal challenge. Instead, the court recognized it (and its validity), yet improperly attempted to retroactively eliminate it. It is this point our opponents decline to debate.

Appellees' claim (pages 7-10): In varying ways appellees say the Florida court decided the case on state equal protection grounds, i.e., they argue again that the pre-*Battilla* statute did not deny equal protection. Reply: Our opponents continue to miss the point, or intend to obfuscate it. *Battilla* amended the statute. Pullum challenged the statute *as amended.* No one says the amended statute met any equal protection standard under any constitution anywhere.

A further point: appellees' reason for citing Wright, *Federal Practice and Procedure,* 1985 Supplement, Section 4022 at 440 (1977) is indecipherable. The cited section simply confirms this Court's jurisdiction and leads one to read *Michigan v. Long,* 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476, 77 L.Ed.2d 1201, 1205 (1983), which reiterated a point epitomized by the *Pullum* opinion:

> . . . ambiguous or obscure adjudications by state courts

do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.

Justice Stevens' dissent also supports jurisdiction here since "in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard". *Id.*, 103 S. Ct. at 3490 (emphasis in original). Although the Florida court purports to have eliminated the premise of Pullum's equal protection argument, the decision cannot begin to do that unless it retroactively eliminates the vested rights of those whose causes of action came into being under the protection of the *Battilla*-amended statute. However, the Florida court has specifically been asked, does not know, and consequently has refused to say whether *Pullum* is even *intended* to be retroactive. *Cassidy v. The Firestone Tire and Rubber Company*, Case No. 68,160 (January 21, 1986)(App. 37a)(Appellees' App. 41a). This well illustrates the ambiguity and obscurity of the *Pullum* opinion.

Moreover, a half century ago this Court taught Florida's supreme court a key lesson in equal protection. In *Smith v. Cahoon, supra*, the Florida court, by statutory construction, attempted to skirt a 14th Amendment challenge to a statute which, like the amended statute here, made a classification "not based on anything having relation to the purpose for which it is made." 283 U.S. at 567, 51 S. Ct. at 587. This Court reversed; the challenger was entitled to assert his constitutional right by virtue of the invalidity *as of the time* the statute was applied to him. 283 U.S. at 565, 51 S. Ct. at 586; *accord, Ashton v. Kentucky*, 384 U.S. 195, 199, 86 S. Ct. 1407, 1409, 16 L.Ed.2d 469, 471, (1966). Today's Florida court has forgotten this lesson.

In *Smith v. Cahoon* this Court gave another reason for reversing the Florida court's belated attempt to give the invalid statute a saving construction:"The decision thus aims to remove the constitutional objection of invalid application

only by creating another constitutional objection . . . ." 283 U.S. at 565, 51 S. Ct. at 586. Just so, in *Pullum* the Florida court's deunconstitutionalization of the amended statute could not retroactively eliminate vested *Battilla*-born rights of action without violating due process. *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971); *Davis v. Artley Const. Co.,* 18 So.2d 255, 259 (Fla. 1944); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 681-682 n.8, 50 S. Ct. 451, n.8, 74 L.Ed. 1107, 1114 n.8 (1930); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 53 S. Ct. 145, 148, 77 L.Ed. 360, 366 (1932); *Bouie v. City of Columbia,* 378 U.S. 347, 354-355, 84 S. Ct. 1697, 1703, 12 L.Ed.2d 894, 900-01 (1964).

Appellees' brief repeatedly demonstrates that the ambiguous and obscure Florida adjudication is being used (as was the similar adjudication 55 years before in *Smith v. Cahoon)* as an attempted barrier to this Court's determination of the 14th Amendment equal protection challenge.

Pages 10-12. The "Motion To Dismiss — No Federal Question". Appellees' claim (page 12): Summarizing, appellees say: "Appellee contends that Appellant did not raise a federal question which was presented and considered and decided by the Florida Supreme Court . . . ." Reply: Are their *no* bounds to appellees' attempt to preserve the windfall handed them by the Florida court? Appellees know we raised the federal equal protection challenge at each level below. The trial court recited it (Jurisdictional Statement at 5 and 6; App. 17a; Appellees' App. 21a). We repeated it in both the district and supreme courts, and there relied on this Court's decision in *Zobel v. Williams.* Here is the title to the Argument section of our initial brief in the Florida supreme court:

> THE ACCESS TO COURTS GUARANTEE OF THE FLORIDA CONSTITUTION HAS SO ALTERED SECTION 95.031(2) THAT ITS ONLY REMAINING

MEANS OF APPLICATION VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Thus, the federal equal protection challenge was put squarely before Florida's supreme court. *Street v. New York,* 394 U.S. 576, 583-84, 89 S. Ct. 1354, 1361-62, 22 L.Ed.2d 572, 579-580 (1969); *New York ex rel Bryant v. Zimmerman,* 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L.Ed. 184, 187 (1928). It is frivolous for appellees to suggest otherwise. The Florida court merely used the equal protection violation as an entree to a reconsideration of *Battilla.* The defect in the court's after-the-fact approach is that the nonretroactivity of *Pullum* prevents the court from having "eliminated the premise of Pullum's equal protection argument."

Pages 13-16. The "Motion to Dismiss — Other Grounds". Appellees' claim (paragraph 2, page 13): The Florida court rejected the contention that it did not eliminate the premise of the federal equal protection argument. Reply: Appellees contradict this by saying (page 14) "The language does *not* say that the *federal equal protection* premise had been removed." As we said in the jurisdictional statement, "The Federal Equal Protection Challenge Remains — Unresolved." It is ripe for decision.

Appellees' claim (page 14): The Florida court "based its decision on independent and adequate state equal protection grounds." Reply: If a state court holds a statute *un*constitutional under a stricter test set by a state equal protection clause, that is a basis for this Court's denying review. *Michigan v. Long.* But, when a federal equal protection challenge is made, and a state court upholds a statute under a less strict state test, this does nothing to answer or eliminate the federal challenge of which this Court is the final arbiter. Thus, when a state court *upholds* a state statute in the face of a federal equal protection challenge, this Court has jurisdiction. 28 USC § 1257(2).

Appellees' claim (pages 13-15): "Appellant proceeds to criticize the court unduly." Reply: While appellees protest the phrasing, they do not dispute the criticism itself. Please note that although appellees quote the analysis made on page 9 of the jurisdictional statement, they do not debate its accuracy. Nor do appellees deny that they, too, had accepted that *Battilla* was and would remain the law. To accurately criticize this surprise decision, which shocked and confused the Bench and Bar of Florida, is neither to be impertinent nor disrespectful, nor is it to question integrity.

More importantly, appellees ignore the real significance of the analysis: *Battilla* was a clear, unchallenged polestar decision which had applied the fundamental Florida constitutional guarantee of access to courts; the receding from this protector of that guarantee was not foreshadowed by any prior decision and constituted a sharp break in the web of the law. This bolt from the blue cannot be permitted to eliminate retroactively a valid federal equal protection challenge. To tolerate a "now you see it, now you don't" approach to equal protection would send the wrong signal to the state courts and would have a chilling effect on good faith challenges to denials of equal protection.

Appellees' claim (pages 15 and 16): Appellant "misstates the general rules concerning retroactive application of the court's decision." Reply: We stated, not general rules of retroactivity, but the specific rules governed by due process considerations when actions have been taken in reliance upon clear, unchallenged precedent. *Davis v. Artley Const. Co.*, 18 So.2d 255, 259 (1944); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296, (1971). The case cited by appellees, *Linder v. Combustion Engineering Company*, 342 So.2d 474 (Fla. 1977), is completely inapposite. It dealt with the adoption, by name, of §402A strict products liability; *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976). Retroactive application there was legitimate since the adoption of §402A was quite foreseeable; indeed, in *West*, 336

So.2d at 86, the court noted it was merely putting old wine into a new bottle:

> We believe that the prior decisions of this Court are in conformity with the principles set forth in the Restatement (Second) of Torts §402A, quoted above. Such a recognition by the Court is no great new departure from present law and, in most instances, accomplishes a change of nomenclature.

No right thinking student of Florida law would say that the receding from *Battilla* was "no great new departure from present law."

Appellees' claim (page 16): "The Florida Supreme Court was not prohibited from changing a decision construing the constitutionality of a statute." Reply: This is why we said in the jurisdictional statement that Pullum does not quarrel *in this Court* with that court's right to reverse itself and change the rule *for the future.* Pullum's complaint here is that, at the time he suffered the summary judgment, he was without doubt denied equal protection and that, recognizing this, the Florida court purports to have retroactively eliminated his valid federal equal protection challenge, i.e., it reversed itself and changed the rule *for the past.* It bears repeating: In *Huson* this Court rejected "the fiction that the law now announced has always been the law." 92 S.Ct. at 356.

CONCLUSION

The protection of the 14th Amendment should be restored in this case. The Court should grant plenary review or summary reversal.

Respectfully submitted,

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